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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in announcing and applying in this retaliation case under the Age Discrimination in Employment Act, 29 U.S.C. § 623(d) ("ADEA"), a *per se* standard of liability by which (a) the plaintiff is not required to prove pretext and discriminatory intent, in conflict with the decision of this Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), (b) the alleged discriminatory animus of a non-decisionmaker is automatically imputed to the decisionmaker, in conflict with the decision of this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and (c) the decisionmaker is charged with constructive knowledge of plaintiff's protected classification, in conflict with decisions of other Courts of Appeals?

2. Whether the Second Circuit erred in announcing and applying a *per se* standard of "willfulness" under the ADEA where the only evidence of willfulness was the decisionmaker's constructive knowledge of the plaintiff's protected activity, his knowledge that retaliation is impermissible, and his completing an adverse decision he had begun before he gained actual knowledge of the plaintiff's protected activity?

3. Whether the Second Circuit erred in relieving plaintiff of his obligation to mitigate his damages by seeking comparable employment and in approving a lifetime award of front pay to a relatively young plaintiff?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, Metro-North Commuter Railroad Company, is a railroad corporation that is a subsidiary of the Metropolitan Transportation Authority, a public authority of the State of New York. *See* Metropolitan Transportation Act, N.Y. Pub. Auth. Law §§ 1260 to 1279-b (McKinney 1982 & Supp. 1997). Metro-North Commuter Railroad Company does not have any subsidiary companies.

Respondent Stephen M. Padilla is an individual. Respondent Equal Employment Opportunity Commission is an agency of the United States government. *See* 42 U.S.C. § 2000e-4.

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Petitioner Metro-North Commuter Railroad Company ("Metro-North") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the United States District Court for the Southern District of New York (A-27 to A-44) have not been officially reported. The opinion of the United States Court of Appeals for the Second Circuit (A-1 to A-20) is reported at 92 F.3d at 117.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1996, and Metro-North's timely petition for rehearing was denied on December 13, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 4(d) and 7(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623(d), 626(b), are reproduced in the Appendix. (A-47 to A-48)

STATEMENT OF THE CASE

This retaliation case under the ADEA arises from the feud between plaintiff Stephen M. Padilla and his immediate supervisor, Edmond Boni. By Padilla's own admission, the feud started at the end of January 1988; it resulted, in mid-1988, in the removal of both from their respective management positions by Boni's immediate superior, Donald N. Nelson. (Ex. 8; Tr. at 486-87)[1] Nelson's reasons for the

[1] References to "Ex." are to the exhibits admitted into evidence at trial; exhibits identified by a number are plaintiffs' exhibits, and exhibits

adverse actions were Boni's and Padilla's mismanagement of their respective departments, which included their infighting, Padilla's "withdrawal" and lack of interest in his job, as well as the administrative failings disclosed by an audit of Padilla's department. (Exs. B, G, 12; Tr. at 321-26, 565-77)

1. Padilla's and Boni's Feud and Nelson's Removal of Both

Padilla was Superintendent, Train Operations, in charge of the Operations Control Center ("OCC") (Tr. at 72), Boni was General Superintendent, Transportation, in charge of the four subdepartments comprising the Transportation Department (Tr. at 183-84, 476), and Nelson was Vice-President, Operations, responsible for some 5,100 of Metro-North's 5,600 employees. (Tr. at 543)

Before his promotion into Metro-North management in 1983, Padilla had worked for nine years as a tower operator and train dispatcher for Penn Central Transportation Corporation and Consolidated Rail Corporation, Metro-North's predecessor railroads. (Tr. at 37-38) Boni had been responsible for Padilla's promotion in 1985 to Superintendent, Train Operations (Tr. at 479), and Boni had consistently given Padilla favorable performance evaluations. (Ex. 7)

As Superintendent, Train Operations, Padilla was responsible for supervising the train dispatchers. (Tr. at 480) His duties included administering a budget, assigning jobs and administering the payroll. (Tr. at 99) Padilla's department had only about 35 employees. (Tr. at 307) Padilla's salary was approximately $65,000 (Tr. at 374-75); he was "paid well" to manage OCC. (Tr. at 617)

In 1987, Boni hired Marijanke Badurina, an analyst from the Budget Department, to assist him in preparing his budget and to identify areas where savings could be achieved. (Tr. at

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identified by a letter are defendant's exhibits. References to "Tr." are to the transcript of the trial.

481) Beginning in February 1988, Badurina reviewed Padilla's department's books. (Tr. at 183, 361, 481)

Meanwhile, Padilla and Boni had already begun feuding, causing Padilla to complain by letter of March 23, 1988 to Nelson, Boni's boss, that Boni was out to get him and was keeping a "paper trail" on him. Padilla complained that Boni had unfairly accused him of attempting a "coup" to unseat him. In his letter to Nelson, Padilla described himself as a "street fighter," and he described Boni as "insecure, jealous, and at best, average at what he does." He expressly threatened to retaliate if anything happened to his job. (Ex. 8)

On April 5, in response to Padilla's March 23 letter, Nelson met with him and advised him to meet with Boni to work out their differences. (Tr. at 308-09) Padilla thanked Nelson for the meeting. (Tr. at 561-62)

On April 6, an employee was killed in a train collision. (Tr. at 68, 562) Nelson directed an investigation of the collision, which consumed his entire day. (Tr. at 652-63)

On April 7, Padilla made an affidavit in the Equal Employment Opportunity Commission's ("EEOC") investigation of an age discrimination charge filed by Michael Barletta, one of the train dispatchers in Padilla's department, whom Padilla himself had summarily disqualified in July 1987. (Exs. 5, 22) In his April 7 affidavit, Padilla stated that Boni had required him to disqualify Barletta and attributed to Boni age-based comments,[2] but Padilla concluded his affidavit by stating that he did not believe Boni was motivated by age discrimination. (Ex. 5) At no time before it occurred had Padilla opposed the disqualification of Barletta on the ground that he believed it to be discriminatory (Tr. at 87-89), and Padilla's March 23 letter to Nelson nowhere mentions Barletta or the EEOC's investigation of his charge of age discrimination as a source of Padilla's troubles with Boni. (Ex. 8)

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[2] Others made affidavits to the EEOC in which they also attributed to Boni age-based comments. (Exs. K-M)

On May 3, 1988, Boni took to Nelson information implicating Padilla's mismanagement of his department. The data Nelson reviewed on May 3 showed that the dispatchers were being allowed to "couple" scheduled rest days with sick days, so that employees were being paid for days not worked. (Ex. 10; Tr. at 566-69)

On May 4, Nelson, having questioned Padilla, who proved unable to answer any of Nelson's questions, suspended Padilla with pay and ordered a more complete investigation and report. (Tr. at 370-75) Nelson's handwritten note of the May 4 meeting with Padilla displays Nelson's anger and lists the three alternatives Nelson considered at the time, with the first being immediate demotion, the second being transfer to another department, and the third being suspension with pay pending further investigation. (Ex. B) Nelson chose the third option and closed his meeting with Padilla by informing him that he was suspended. (Tr. at 370-71) Nelson reported his action to his superior, Metro-North's President Peter Stangl. (Ex. G; Tr. at 563)

On May 9, Padilla filed a charge of retaliation with the EEOC, claiming in his affidavit that Boni had threatened him for cooperating with the EEOC. (Ex. 6) Nelson learned about the retaliation charge on May 10. (Ex. G; Tr. at 295-98)

Upon suspending Padilla, Nelson had ordered David Dieck, Director, Operating Budgets, who reported directly to Nelson, to conduct an investigation. (Tr. at 419) Dieck's investigation, which examined data for additional months, confirmed Nelson's assessment of the data he had reviewed on May 3 and disclosed many other administrative and recordkeeping failings in Padilla's department. (Tr. at 426-29; Ex. 13)

On May 13, upon reviewing Dieck's report, Nelson removed Boni from his position (Tr. at 318, 574), transferring him from a position where he had a budget of some $90 million and 1,200 subordinates to a position where he had no budget and no subordinates. (Ex. 12; Tr. at 477, 480, 488) In his discussion with Boni, Nelson emphasized that the trans-

fer was a "demotion" and that Boni would "lose some money." Nelson commended Boni for commencing the investigation leading to the discovery of the administrative problems in OCC but advised him that he had had enough time, four years, to bring under control the administrative aspects of the Transportation Department. (Ex. 12) Boni left the Company at the end of 1988. (Tr. at 488)

Nelson replaced Boni with Richard Sinigiani. (Ex. 12; Tr. at 514) For the next few weeks, Nelson continued to receive followup reports from Dieck and reviewed Sinigiani's progress at correcting the administrative failings in OCC. (Exs. 13-14) At one meeting with the staff in late May, Nelson stressed the importance of their getting along. (Ex. 14) Nelson kept Stangl informed; Stangl required assurance that "we did a fairly complete investigation and got the situation corrected . . . ." (Tr. at 573)

Nelson held off with respect to Padilla, however, because he had learned from counsel on May 10 that Padilla had, after Nelson had suspended him, filed a charge of retaliation with the EEOC. On counsel's advice, Nelson decided to wait until the EEOC completed its investigation. (Tr. at 571-72)

On June 10, upon completion of that investigation, Nelson removed Padilla from his management position and advised him to exercise his rights under the union contract covering dispatchers. (Tr. at 573)

Nelson kept Stangl informed of his actions and decisions throughout the period May 3 through June 10. Like Nelson, Stangl was concerned that "so much tension and acrimony between the key players . . . was having an effect on the department and could have an effect on service and morale." (Tr. at 573)

2. Proceedings in the District Court

The district court denied Metro-North's motion for summary judgment, holding that despite Nelson's sworn affidavit that he did not know about Padilla's EEOC affidavit at the

time he decided to demote him, circumstantial evidence raised a question of material fact as to whether Boni had told Nelson about Padilla's EEOC affidavit. (A-43) The district court granted Metro-North's motion for reconsideration in the light of *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), but denied the renewed motion for summary judgment, holding, once again, "that '[a] reasonable jury could find that Mr. Nelson learned of Mr. Padilla's statement [to the Equal Employment Opportunity Commission] and, consequently, demoted him.' " (A-37) (citation omitted).

At trial, Padilla did not dispute that he was in fact guilty of the mismanagement for which Nelson faulted him, blaming it on his subordinates and a lack of time. (Tr. at 43-45, 77-78) He disclosed for the first time that he had discussed Barletta's disqualification with Nelson, some three months after Padilla had effected it and six months before he made his EEOC affidavit. He testified that, during a trip to London with Nelson in October 1987, he had told Nelson, "Boni was telling me [Padilla] that Barletta was too old and too slow and making mistakes." (Tr. at 65) At trial, Padilla also disclosed for the first time that he had lied in his EEOC affidavit when he said he did not believe Boni had intended to discriminate against Barletta because of his age. (Tr. at 85, 103) Padilla called several witnesses, who testified that he had not wanted to disqualify Barletta, but none of them testified that Padilla had ever said he believed the disqualification to be discriminatory. (Tr. at 125, 153-54, 182; *see also* Tr. at 469)

Nelson continued to deny knowledge of Padilla's EEOC affidavit at the time he suspended him and denied that Barletta's name was mentioned in any of his conversations with Padilla, in London or elsewhere. (Tr. at 558-59, 562, 564) Nelson recounted that, on the London trip, Padilla, going over Boni's head, had requested to swap jobs with another of Boni's direct reports; after Nelson reprimanded him for this inappropriate behavior, Padilla returned to New York the next day, cutting the trip short by five days. (Tr. at 557-58)

Nelson testified in detail about his review of the information brought to him by Badurina and Dieck, stating that he had no reason to suspect that any of the information presented to him was infected with a retaliatory animus and that Padilla's EEOC affidavit had had nothing to do with his ultimate decision to demote him. (Tr. at 585-86) Nelson, with railroad and military supervisory experience of more than thirty years (Tr. at 552), testified too that the infighting in the Transportation Department, "the first time in [his] career [he] had seen anything like that" (Tr. at 574), had ceased upon his removal of Boni and Padilla. (Tr. at 577)

The others who had made affidavits for the complainant in the EEOC investigation testified that they had not suffered any adverse action; one testified that he had been promoted into management. (Tr. at 171-72, 174-76, 474)

Boni testified that he and Padilla had agreed Barletta should be disqualified, that "[i]t was understood Barletta's performance was slipping considerably" (Tr. at 486), and that he did not believe he had "violated any law" with respect to that disqualification. (Tr. at 537; *see also* Tr. at 356) He testified that he and Padilla had had an "excellent working relationship" until Padilla went to London with Nelson; he admitted he had called Padilla in to discuss rumors about a "coup," but said that that meeting was "the extent of it." (Tr. at 486-87) Boni explained that he had reported Padilla's suspected mismanagement to Nelson because the information Badurina had uncovered, reflecting the "misappropriation of moneys," was a "serious enough matter" to report to his boss and was something that "[he] couldn't take care of [himself]." (Tr. at 482-84) He also testified about his transfer and his departure from the Company. (Tr. at 487-88)

Padilla did not dispute Boni's reasons for going to Nelson, and he did not contend either that there was no problem to be fixed or that he and Boni could have fixed the problem without Nelson's knowledge.

Karen Timko, one of Metro-North's in-house attorneys, was the only witness who testified about discussing Padilla's EEOC affidavit with Nelson. She testified that, to explain Padilla's retaliation charge to Nelson, she had to explain Padilla's earlier affidavit in the EEOC investigation of Barletta's charge. (Tr. at 229)

The court submitted the case to the jury under a *Hicks* instruction (Tr. at 727-28), and the jury returned a verdict for the plaintiffs, finding that Metro-North had "willfully" retaliated against Padilla. (Tr. at 772)

The court conducted a separate hearing on prospective relief. At that hearing, Padilla described himself as a train dispatcher and described his skills as "virtually unique." (Sept. 15, 1994 Tr. at 17) He admitted that he had not looked for comparable employment. (Sept. 15, 1994 Tr. at 17-19)

The court denied Metro-North's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (b) or for a new trial pursuant to Fed. R. Civ. P. 59, holding that Nelson's admitted knowledge of Padilla's charge of retaliation after he suspended him established Nelson's knowledge of Padilla's protected activity and that Nelson's following through with his preliminary decision to demote Padilla established causation. (A-28 to A-29) The court declined to order reinstatement, but ordered front pay for Padilla until his expected retirement at age 67—that is, for 25 years. (A-32 to A-34) Ruling upon the EEOC's request for injunctive relief, the court ordered Nelson's immediate subordinates,[3] but not Nelson himself, to sign a statement acknowledging that retaliation is unlawful. (A-34)

3. The Second Circuit's Decision

On appeal, the Second Circuit affirmed the judgment in its entirety. It applied a version of the mixed-motives analysis of

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[3] Nelson was President of Metro-North at the time of trial. (Tr. 551)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (A-12), holding that in a disparate treatment case plaintiff is

> " 'not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors.' "

(A-12) (quoting *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995). The Second Circuit imputed to Nelson the alleged retaliatory animus of Boni and the actions of Badurina, held that the jury could have found that Nelson had constructive knowledge of Padilla's EEOC affidavit and its contents before he suspended him, and held that plaintiffs had satisfied their burden to prove causation. (A-11 to A-13)

The Second Circuit also held: (1) that plaintiffs had sufficiently proved "willfulness" under the ADEA by Nelson's admitted knowledge that retaliation is unlawful and his following through with the adverse decision (A-13 to A-15); (2) that Padilla was not required to mitigate his damages by looking for comparable employment (A-17 to A-18); and (3) that the lifetime award of front pay, which the court acknowledged was "for a period of well over 20 years," was appropriate in the "unique circumstances of this case." (A-18 to A-20)[4]

REASONS FOR GRANTING THE WRIT

This case raises critical issues concerning the applicable standard for liability, the allocation of the burden of proof, the availability to a corporate defendant of judgment as a matter of law in all types of discrimination cases, and the appropriate measures of relief for a victim of discrimination. Metro-

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[4] Although we believe it to be erroneous, we do not ask this Court to review the Second Circuit's holding that Metro-North did not adequately establish an "after-acquired" evidence defense under *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995). (A-15 to A-17)

North respectfully submits that the Second Circuit has erroneously stated and applied in this case a *per se* negligence standard. *Cf. Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (reversing holding of the Court of Appeals for the District of Columbia Circuit that "employers are always automatically liable for sexual harassment by their supervisors") (citation omitted).

The Second Circuit first holds that a disparate treatment plaintiff is not required to prove pretext, thus transforming a "pretext" case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny in this Court, particularly *Hicks*, into a "mixed-motives" case under *Price Waterhouse*. (A-12) Without concluding that an impermissible motive "was a factor in *the* employment decision *at the moment it was made*," *Price Waterhouse*, 490 U.S. at 241 (Brennan, J., plurality opinion), *see also, id.* 261-62 (*Price Waterhouse* evidentiary rule applies "in cases such as this one where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion") (O'Connor, J., concurring), the Second Circuit reasons backward, "post hoc, ergo propter hoc," and imputes to Nelson the alleged retaliatory animus of Boni. (A-12 to A-13) The Second Circuit's decision stands in conflict with decisions of other Courts of Appeals, which have not so confused the "pretext" and "mixed motives" analyses by imputing to the undisputed decisionmaker the alleged discriminatory animus of a non-decisionmaker. *E.g., Lattimore v. Polaroid Corp.*, 99 F.3d 456, 465-68 (1st Cir. 1996); *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987); *Williams v. Williams Elec., Inc.*, 856 F.2d 920, 925 (7th Cir. 1988); *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1413-16 (7th Cir. 1984).

The decision of the Second Circuit also stands in direct conflict with decisions of other Courts of Appeals, which have held that where the adverse decision occurs before the plaintiff engages in protected activity or otherwise makes his

protected classification known, defendant cannot have discriminated against him for that reason. *E.g.*, *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 636 (1st Cir. 1996); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 883 (6th Cir. 1996); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982).

The Second Circuit, in contrast, reasons forward in time to hold that plaintiffs proved causation with respect to Nelson's initial decision to suspend Padilla, holding that the jury could have found from two isolated, ambiguous, and entirely self-serving comments made six months apart that Nelson had constructive knowledge of Padilla's EEOC affidavit and its contents *before Padilla even made it*. This holding stands in direct conflict with decisions of other Courts of Appeals rejecting as too speculative such vague "proof" of the decisionmaker's knowledge of plaintiff's protected activity. *E.g.*, *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *Gunther v. County of Washington*, 623 F.2d 1303, 1316 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

The resulting composite standard—first and automatically, a "mixed-motives" approach, second, somebody else's impermissible motive automatically imputed to the decisionmaker and, third, the decisionmaker's constructive knowledge, not of the unlawful motive, but of the plaintiff's protected classification—is not a discrimination standard at all but is a *per se* negligence standard. Other Courts of Appeals have, on similar fact patterns, rejected such a standard. *E.g.*, *Jackson v. Delta Special School Dist.*, 86 F.3d 1489, 1495 (8th Cir. 1996); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 435-36 (5th Cir. 1995); *Wilson*, 952 F.2d at 946.

If allowed to stand, the Second Circuit's decision will not only undermine both *McDonnell Douglas* and *Price Waterhouse*, but will also severely curtail, if not eliminate entirely, the availability of judgment as a matter of law in discrimination cases, in conflict with numerous decisions, cited throughout this petition, of other Courts of Appeals. The result will be that all cases will raise triable questions of fact,

juries will be encouraged to second-guess legitimate business decisions, no matter how conscientiously made, and discrimination statutes will become "just cause" progressive discipline laws. *See Hicks*, 509 U.S. at 514-15.

The Second Circuit's other holdings further expand an employer's liability. First, in its holding that plaintiff proved the decisionmaker's willfulness by merely proving that he knew about the protected activity and that he knew that retaliation is unlawful (A-13 to A-14), the Second Circuit's decision relieves the plaintiff of the obligation to prove "willful" disregard of the law. This *per se* rule is contrary to the plain meaning of the word "willful" and to *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985), where this Court specifically held that knowledge that the ADEA is "in the picture" is insufficient.

Second, in its holding that plaintiff need not prove that he sought comparable employment and that defendant must prove the availability of comparable positions (A-17 to A-18), the Second Circuit's decision is contrary to decisions of other Courts of Appeals which shift the burden to defendant only after plaintiff establishes a reasonable mitigation effort. *E.g.*, *Tubari Ltd. v. NLRB*, 959 F.2d 451, 453-54 (3d Cir. 1992); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991); *Sellers v. Delgado College*, 902 F.2d 1189, 1193-94 (5th Cir.), *cert. denied*, 498 U.S. 987 (1990). The Second Circuit's further holding that plaintiff sufficiently mitigates his damages if he exercises his seniority rights to a lower-paying union position (A-18) directly conflicts with *Tubari*, 959 F.2d at 457.

Finally, in its holding that a 25-year award of front pay is necessary to make the plaintiff whole (A-19 to A-20), the Second Circuit's decision is contrary to numerous decisions holding that prospective relief should be limited to a reasonable "bridge" period. *See, e.g., EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977), and, further, that, in awarding equitable relief, the

court should consider plaintiff's efforts to mitigate his damages. *E.g.*, *Barbour v. Merrill*, 48 F.3d 1270, 1279-80 (D.C. Cir. 1995); *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 159 (2d Cir. 1992), *cert. denied*, 510 U.S. 908 (1993). *See also United Paperworkers Int'l Union v. Champion Int'l Corp.*, 81 F.3d 798, 805 (8th Cir. 1996) (criticizing award of front pay for 24 years in light of employee's continuing duty to mitigate and his "relatively young age").

I. THE SECOND CIRCUIT ERRED IN ANNOUNCING AND APPLYING A *PER SE* STANDARD OF LIABILITY RELIEVING THE PLAINTIFF OF HIS BURDEN TO PROVE THAT THE DECISION-MAKER INTENDED TO DISCRIMINATE, THAT HIS REASONS FOR THE ADVERSE DECISION WERE PRETEXTUAL, OR THAT HE HAD ACTUAL KNOWLEDGE OF THE PLAINTIFF'S PROTECTED CLASSIFICATION AT THE TIME HE COMMENCED THE ADVERSE DECISION

A. IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH *ST. MARY'S HONOR CTR. V. HICKS*, 509 U.S. 502 (1993), AND *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989), THE SECOND CIRCUIT ERRED BY IMPUTING TO THE DECISION-MAKER THE ALLEGED RETALIATORY ANIMUS OF A NON-DECISIONMAKER.

The Second Circuit did not discuss or apply a pretext analysis with respect to Nelson's decisions to suspend and then to demote Padilla. Instead, by its holding that the plaintiff is required only to prove "that the employer's proffered reasons . . . were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors" (A-12) (quoting *Cronin*, 46 F.3d at 203) (internal quotation marks omitted), the Court transformed a "pretext" case under *McDonnell Douglas* and its progeny into a "mixed-motives" case under *Price Waterhouse*. (A-12 to A-13)

Without distinguishing the roles of Boni (and Badurina) from that of Nelson, the Second Circuit imputed to Nelson a number of fragmentary statements by, and actions of, Boni and Badurina taking place over a period of about 20 months and linked them together without citing any evidence of Nelson's actual knowledge of them or of a nexus to his decisionmaking process. (A-12 to A-13)

In almost identical fact situations, other Courts of Appeals have applied the pretext analysis and have held defendant was entitled to judgment as a matter of law where plaintiff presented no evidence of the decisionmaker's discriminatory intent. For example, in *Wilson v. Stroh Cos.*, 952 F.2d 942 (6th Cir. 1992), plaintiff argued that the racial prejudice of his immediate supervisor "caused" the adverse decision made by a higher-level supervisor because his immediate supervisor reported his misconduct. *Id.* at 946. The Sixth Circuit held that plaintiff had not established a *prima facie* case where the higher-level supervisor had taken the adverse action on the recommendation of the industrial relations manager, who conducted an independent investigation into the misconduct reported by the supervisor. *Id.* The Court further held that "[t]his is not a 'mixed-motives' case" because plaintiff offered no evidence of racial animus on the part of the decisionmaker or the industrial relations manager. *Id. See also, e.g.*, *Lattimore*, 99 F.3d at 467-68 (applying pretext analysis; where employer presented evidence that supervisor did not participate in adverse decisions, court found no "basis for concluding that any alleged racial prejudice on [the supervisor's] part infected those decisions" and held employer entitled to judgment as a matter of law); *Ray*, 63 F.3d at 435-36 (applying pretext analysis and affirming summary judgment; alleged discriminatory bias of supervisor not evidence of pretext where he was not "solely responsible for the decision to place [plaintiff] on a [performance improvement plan] and [where] he had no input into the decision to terminate her"); *Williams*, 856 F.2d at 925 (applying pretext analysis and affirming summary judgment; alleged racial animus of supervisors was "attributable to individuals who were not involved

in the layoff decision" and was not evidence of pretext). *Mauter*, 825 F.2d at 1558 (applying pretext analysis and affirming summary judgment; statement of vice-president that the company "was going to weed out the old ones" held "too attenuated" where he did not participate in the decision to eliminate plaintiff's position); *La Montagne*, 750 F.2d at 1412 (applying pretext analysis and affirming post-trial motion for judgment as a matter of law; statement by member of board of directors to president not to fire plaintiff until he had a younger replacement held "not probative" of the president's intent).

Even where the impermissible motive is allegedly held by a decisionmaker, or by one upon whose recommendation the decisionmaker has acted in making the adverse decision, this Court in *Price Waterhouse* emphasized that the impermissible motive must be causally related to the challenged decision. 490 U.S. at 241 (Brennan, J., plurality opinion). *See also id.* at 241 ("When, therefore, an employer considers both gender and legitimate factors *at the time of making a decision,* that decision was 'because of' sex . . ."") (emphasis added); *id.* at 250 ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman") (emphasis added); *id.* at 246 n.11 (the inquiry is whether "gender was a factor in a *particular* decision *when it was made*") (emphasis added). In a separate concurrence in *Price Waterhouse*, Justice O'Connor emphasized:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Id. at 277 (O'Connor, J., concurring) (citation omitted).

Accordingly, other Courts of Appeals have held, in contrast to the view of the Second Circuit in this case, that "stray remarks," even if made by a decisionmaker, do not shift the burden to the defendant. *E.g.*, *Jackson*, 86 F.3d at 1495 (comment by person recommending termination of plaintiff that her filing complaint with EEOC was " 'not the sole reason' " for her termination held "ambiguous at best" and insufficient evidence of pretext as a matter of law where there was ample evidence of her disloyalty to him and her disruptiveness in the workplace); *Geier v. Medronic, Inc.*, 99 F.3d 238, 242-43 (7th Cir. 1996) (rejecting "mixed-motives" analysis where comments made by decisionmaker were directed at plaintiff's absenteeism and were not probative of pregnancy discrimination).

Other Courts of Appeals have also recognized the propriety of judgment as a matter of law, even under *Price Waterhouse*, where defendant produces evidence such as Metro-North produced in this case. *Cesaro v. Lakeville Community School Dist.*, 953 F.2d 252, 254-56 (6th Cir.), *cert. denied*, 506 U.S. 867 (1992) (applying *Price Waterhouse* and reversing judgment for plaintiff as matter of law where school board chose the most qualified candidate, despite plaintiff's contention she would have been awarded the position in the absence of the Superintendent's discriminatory animus in seeking additional applicants); *La Montagne*, 750 F.2d at 1407, 1412-13 (applying mixed motives analysis and affirming grant of post-trial motion for judgment as a matter of law where evidence that the president, the sole decisionmaker, was "fed up" with the plaintiff; remark by member of the board held "not probative" of president's motivation).

The Second Circuit, however, established a new *per se* negligence standard. Under this new standard, the alleged discriminatory animus of another in the corporate hierarchy is automatically imputed to the decisionmaker. Causation—a breach of the duty imposed by law not to discriminate—is then easily supplied where the non-decisionmaker's animus "causes" the adverse decision in the sense that he reports the

plaintiff's performance problems to the decisionmaker, resulting in the decisionmaker's then making an adverse decision. Because it does not matter under this standard whether the decisionmaker himself harbored a discriminatory intent or whether his decision was pretextual, this standard negates the holding of *Hicks* that plaintiff must prove his *prima facie* case, and then, after defendant articulates its legitimate nondiscriminatory reason, must prove both pretext and discriminatory intent. *Hicks*, 509 U.S. at 514-15. The standard also negates the holding of *Price Waterhouse* that plaintiff succeeds in shifting to defendant the burden of proof only when he produces evidence that the decisionmaker acted with a discriminatory intent at the time he made the adverse decision. *Price Waterhouse*, 490 U.S. at 258.

The Second Circuit's standard prohibits the decisionmaker from relying upon objective information, as Nelson did here; it prohibits him from conducting his own additional and independent investigation, as Nelson did here; it prohibits him from relying upon his own overall assessment of plaintiff's performance, as Nelson did here, and it prohibits him from acting, despite the approval of his own superior, upon his own overall assessment of the best interests of the corporation, as Nelson did here. The employer's only recourse to avoid liability is to refrain from making, or to rescind, the adverse employment decision.

B. IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS, THE SECOND CIRCUIT ERRED IN APPLYING A CONSTRUCTIVE KNOWLEDGE TEST.

There has never been any dispute that Nelson had actual knowledge of Padilla's participation in the EEOC's investigation of Barletta's charge of age discrimination after counsel advised him that Padilla had filed a retaliation charge, by which time Nelson had already suspended him and had already considered demoting him. Since events leading to Padilla's demotion were already in motion by then, there

could, perforce, be no causal connection to the adverse decision. Other Courts of Appeals have held that judgment for defendant as a matter of law is required in these circumstances because otherwise the employee could then easily "set-up" a claim. *E.g.*, *Fennell*, 83 F.3d at 536-37; *Jackson*, 86 F.3d at 1494-95. *See also, e.g.*, *Kelly v. Drexel Univ.*, 94 F.3d 102, 108-09 (3d Cir. 1996) (disability case; holding that "mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action") (citations omitted); *Kocsis*, 97 F.3d at 883-84 (same).

But the Second Circuit holds that the jury could have found that Nelson had knowledge of Padilla's EEOC affidavit and contents on May 4, when he suspended Padilla, by virtue of two ambiguous, self-serving, and isolated comments made six months apart.

The first is Padilla's testimony, first given at trial, that he had told Nelson in October 1987 that Boni had said to Padilla that Barletta was "too old and too slow and making mistakes." (Tr. 65; A-4, A-12). This is an ambiguous comment at best and one Nelson could reasonably have viewed as recounting Boni's legitimate concern about Barletta's performance as a train dispatcher, especially in the light of Padilla's admission at trial that he did not tell Nelson he believed the disqualification of Barletta to have been discriminatory, but only that it was "handled poorly and incorrectly." (Tr. 101-02). The second is Padilla's testimony that, on April 6, 1988, as they were dealing with a train collision, in which an employee had died, he had told Nelson he had an interview scheduled with the EEOC in the Barletta investigation. (A-5, A-12)

From these two comments, the Second Circuit reasons that when Nelson suspended Padilla on May 4, the jury could have found Nelson had knowledge of Padilla's EEOC affidavit and its contents, despite Nelson's repeated denials. This reasoning charges Nelson with prescience. According to it, a plaintiff could establish, for example, disability discrimination by

testifying, after the fact, that one day he told his boss he wasn't feeling well and then six months later he told him he had a doctor's appointment scheduled that day. By the Second Circuit's reasoning, when the boss questions him a month later about performance problems, the boss somehow knows that the doctor's appointment the preceding month was for a potentially disabling condition. Thus, by the Second Circuit's reasoning, the boss questioned him, not because of the performance problems, but because he regarded him as disabled and, looking further into the future, predicted that his potentially disabling condition, when it eventually manifested itself, would severely limit his productivity. This reasoning is far too speculative to support any finding of discrimination. Other Courts of Appeals have held that defendant was entitled to judgment as a matter of law where a jury verdict was based upon such speculation. *Lattimore*, 99 F.3d at 467-68; *Caudill v. Farmland Indus.*, 919 F.2d 83, 86-87 (8th Cir. 1990).

The Court here relied only on plaintiff's vague and self-serving comments to support its holding that Nelson knew of plaintiff's protected activity. Other Courts of Appeals have rejected such comments as insufficient to defeat a motion for judgment as a matter of law. *E.g.*, *Booker*, 879 F.2d at 1313 (holding "vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice"); *Gunther*, 623 F.2d at 1316 (holding no causation and no *prima facie* case where decisionmaker had only "vague awareness" of protected activity). Others have held that vague comments, even by a decisionmaker, are not sufficient to defeat a motion for judgment as a matter of law. *E.g.*, *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); *Jackson*, 86 F.3d at 1495.

Under the Second Circuit's decision, however, "stray remarks," whether by the plaintiff or the decisionmaker, establish the decisionmaker's constructive knowledge of the plaintiff's protected classification, so that the decisionmaker is prohibited from taking any adverse action from that point forward.

II. THE SECOND CIRCUIT ERRED IN ANNOUNCING AND APPLYING A *PER SE* STANDARD OF "WILLFULNESS" UNDER ADEA WHERE THE ONLY EVIDENCE OF "WILLFULNESS" WAS THE DECISIONMAKER'S CONSTRUCTIVE KNOWLEDGE OF PLAINTIFF'S PROTECTED ACTIVITY, HIS KNOWLEDGE THAT RETALIATION IS IMPERMISSIBLE, AND HIS COMPLETING AN ADVERSE DECISION HE HAD ALREADY BEGUN BEFORE HE GAINED ACTUAL KNOWLEDGE OF PLAINTIFF'S PROTECTED ACTIVITY

Willful violations of the ADEA subject the employer to liability for liquidated damages, 29 U.S.C. § 626(b), but a finding of intentional retaliation does not equate to a finding of willfulness. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615-17 (1993). It is simply not enough that the plaintiff proves the decisionmaker knows that ADEA is "in the picture," *Thurston*, 469 U.S. at 127-28, which is all that plaintiffs proved here. In *Thurston*, this Court "reversed an award of liquidated damages because the employer 'acted [nonrecklessly] and in good faith in attempting to determine whether [its] plan would violate the ADEA.' " *Hazen*, 507 U.S. at 616 (brackets in original) (citing *Thurston* with approval).

The Second Circuit's holding, however, is contrary to both *Biggins* and *Thurston* because it equates the finding of retaliation with a finding of willfulness, which requires proof that Nelson knew or had reckless disregard for the fact that his demotion of Padilla would violate ADEA. *Hazen*, 507 U.S. at 615; *Thurston*, 469 U.S. at 128. There was no such proof.

Contrary to the Second Circuit's holding, *Thurston* does not require that Metro-North was obligated to disclose fully the advice of counsel. (A-14 to A-15), Timko testified, without contradiction, that she did not tell Nelson about Padilla's affidavit to the EEOC in its investigation of Barletta's charge until after Padilla had already filed his own EEOC charge of retaliation (Tr. at 229), by which time Nelson had already suspended Padilla pending further investigation. She also testi-

fied about handling the EEOC's investigation of the Barletta charge and said she had not discussed it with Nelson because "she wouldn't have gone that high." (Tr. 512-14)

Given Nelson's persistent, and uncontroverted, denials from the very beginning of this case that he did not even know about Padilla's EEOC affidavit until after Padilla had filed his own retaliation charge, there would have been no reason for Nelson to consult with counsel or for counsel to contact him. At the time Nelson made his decision, other Courts of Appeals had held, as discussed above (Point I.A., *infra*), that the motive of the decisionmaker was dispositive. Even in the Second Circuit, the law has consistently been, until this case, that a retaliation claim required proof not only of knowledge of the protected activity, but also proof of a causal relationship between the protected activity and the adverse decision.[5] That Nelson waited, upon the advice of counsel, to demote Padilla until the EEOC completed its investigation of his charge should be sufficient to establish his good faith reliance upon counsel's advice. That he did not capitulate to the EEOC's views of the merits of Padilla's case does not mean that he acted "willfully." The Second Circuit's decision, how-

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[5] Indeed, other decisions of the Second Circuit and district courts within in the Second Circuit have held just that as a matter of law. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990); *Kazin v. Metro-North Commuter R.R.*, No. 91 Civ. 1331, 1994 WL 68167, *7 (S.D.N.Y. Mar. 1, 1994); *Heller v. Aspin*, No. 92 Civ. 6283, 1993 WL 410471, *2-3 & n.2 (S.D.N.Y. Oct. 8, 1993); *Johnson v. Tower Air, Inc.*, 149 F.R.D. 461 (E.D.N.Y. 1993); *Lawrence v. Baker*, 56 Fair Empl. Prac. Cas. (BNA) 1565, 1573 (N.D.N.Y. 1991), *aff'd without op.*, 963 F.2d 1522 (2d Cir.), *cert. denied*, 506 U.S. 889 (1992). *See also McCarthy v. Cortland County Community Action Program, Inc.*, 487 F. Supp. 333, 343 (N.D.N.Y. 1980) (denying preliminary injunction after hearing because "the evidence . . . [had] shown that plaintiff was not dismissed in retaliation for the sex discrimination charges which she had filed or pursued . . . [but] [r]ather, her sex discrimination charges were apparently a pretext for her own inability to resolve personality and authority conflicts which had developed within the agency's administration.")

ever, imposes *per se* liability for "willfulness" simply because Nelson followed through with a decision already in the making and holds him to a standard of "willfulness" developed only in this very case.

III. THE SECOND CIRCUIT ERRED IN RELIEVING PLAINTIFF OF HIS OBLIGATION TO MITIGATE HIS DAMAGES BY SEEKING COMPARABLE EMPLOYMENT AND IN APPROVING A LIFETIME AWARD OF FRONT PAY TO A RELATIVELY YOUNG PLAINTIFF

A. IN CONFLICT WITH *TUBARI v. NLRB*, 959 F.2d 451 (3d Cir. 1992), THE SECOND CIRCUIT ERRED IN REQUIRING DEFENDANT TO PROVE THE AVAILABILITY OF COMPARABLE POSITIONS WHERE THE PLAINTIFF DID NOT SEEK COMPARABLE EMPLOYMENT BUT MITIGATED ONLY BY EXERCISING HIS SENIORITY RIGHTS AND ACCEPTING A MUCH LOWER-PAYING JOB IN THE UNION RANKS

Although Metro-North satisfied its traditional burden to prove that Padilla had not mitigated his damages in the sense of seeking comparable employment, the Second Circuit imposed yet another burden—the burden to prove the availability of comparable positions. (A-17 to A-18) This holding is contrary to decisions of other Courts of Appeals that evidence of job opportunities "is irrelevant where, as here, the [plaintiff] made no search for comparable interim employment." *Tubari*, 959 F.2d at 459 (citation omitted). *See also, Weaver*, 922 F.2d at 1527 ("If, however, 'an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially comparable employment' ") (quoting *Sellers*, 902 F.2d at 1193). As to the Second Circuit's adoption of Padilla's argument that his skills were "virtually unique" (A-17), any railroad employee could make the same

conclusory argument and thereby excuse his own failure to mitigate his damages. *See Esposito v. Metro-North Commuter R.R. Co.*, 856 F. Supp. 799 (S.D.N.Y. 1994).

The Second Circuit's further holding that Padilla satisfied his duty to mitigate by exercising his rights under the union contract to a much lower-paying job is contrary to the explicit holding of the Third Circuit in *Tubari*, 959 F.2d at 454, that employees did not reasonably mitigate when they accepted jobs from their union at 66% of their former salary without searching for comparable employment.

B. IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS, THE SECOND CIRCUIT ERRED IN UPHOLDING AN UNPRECEDENTED FRONT-PAY AWARD OF TWENTY-FIVE YEARS TO A RELATIVELY YOUNG PLAINTIFF WHO FAILED TO MITIGATE HIS DAMAGES

Padilla was 36 when Nelson demoted him in 1988 and 42 at trial in 1994 (Tr. at 1, 36), and had held the position from which Nelson demoted him for only three years. (Tr. at 479; Ex. 7) The district court awarded him front pay until his expected retirement at age 67. The Second Circuit's holding that the district court's award of front pay was not an abuse of discretion (A-18 to A-20) upholds an award that is, so far as we know, unprecedented, and is contrary to the generally-accepted principle that normally front pay awards should be for a reasonable transition period only and should not be unduly speculative. *See, e.g., Kallir, Phillips, Ross, Inc.*, 420 F. Supp. at 927 (awarding front pay for one year, since purpose of front pay is to give plaintiff "a reasonable opportunity to find other employment," and "by the exercise of diligent effort plaintiff should be able to secure employment at a salary commensurate with her skills within a year"). *See also Weaver*, 922 F.2d at 1528. In addition, it ignores the general principle that in awarding equitable relief in the form of back or front pay, the court should consider the plaintiff's efforts

to mitigate. *See, e.g.*, *Barbour*, 48 F.3d at 1279-80 (front pay award requires consideration of, *inter alia*, plaintiff's age and efforts at mitigation). *See also United Paperworkers*, 81 F.3d at 805 (criticizing award of front pay for 24 years in light of employee's continuing duty to mitigate and his "relatively young age" and collecting cases rejecting as unduly speculative awards of far shorter duration).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1491—August Term, 1995

(Argued: May 17, 1996 Decided: August 13, 1996)

Docket No. 95-6056

STEPHEN M. PADILLA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellees,

—v.—

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellant.

Before:

MESKILL and MINER, *Circuit Judges*, and LASKER, *District Judge.**

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* The Honorable Morris E. Lakser of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from judgment entered in the United States District Court for the Southern District of New York (McKenna, J.) following a jury verdict in favor of employee on his claim of willful retaliation under the Age Discrimination in Employment Act and awarding backpay, liquidated damages, and front pay until employee is 67 years of age.

Affirmed.

PATRICK M. WALL, The McCarthy Law Firm, New York, NY, *for Plaintiff-Appellee Stephen M. Padilla.*

PAUL D. RAMSHAW, Equal Employment Opportunity Commission, Washington, DC (C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Equal Employment Opportunity Commission, Washington, DC, of counsel), *for Plaintiff-Appellee Equal Employment Opportunity Commission.*

CHARLES S. SIMS, Proskauer Rose Goetz & Mendelsohn LLP, New York, NY (Nina Massen, Beth Gorrie, Proskauer Rose Goetz & Mendelsohn LLP, New York, NY, Richard K. Bernard, General Counsel, Carol S. Barnett, Metro-North Commuter Railroad, New York, NY, of counsel), *for Defendant-Appellant.*

MINER, *Circuit Judge*:

Defendant-appellant Metro-North Commuter Railroad ("Metro-North") appeals from a judgment entered in the United States District Court for the Southern District of New York (McKenna, J.) following a jury trial. Plaintiff-appellee Stephen M. Padilla claimed that his employer, Metro-North, willfully retaliated against him in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, ("ADEA") by demoting him after he participated in an Equal Employment Opportunity Commission ("EEOC") investigation of another Metro-North employee's charge of age discrimination. The district court upheld the jury's verdict in favor of Padilla on his willful retaliation claim and awarded him backpay, liquidated damages, and front pay until he is 67 years of age. For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

Given the jury's verdict for Padilla, we view the evidence in the light most favorable to him. Padilla began his employment at Metro-North in January of 1983. In April of 1985, he was promoted to the position of superintendent of train operations. As superintendent of train operations, Padilla was in charge of the operations control center ("OCC") at Metro-North and supervised approximately 35 employees. Padilla reported to Edmond Boni, the general superintendent of transportation, who was in charge of the transportation department at Metro-North. Boni, in turn, reported to Donald Nelson, who was Metro-North's vice president of operations.

One of Padilla's primary responsibilities was to ensure that trains arrived and departed on time. Padilla apparently succeeded in this task. A performance evaluation of his work that was prepared in August of 1987 stated that the "[o]n-time performance" of Metro-North's trains was "above goal in all categories," and his overall rating was listed as "Above Job Expectations." The evaluation also reported that Padilla was "[v]ery cost conscious and a perfectionist by nature," that he was an "[e]xcellent leader and a natural organizer" with the "ability to analyze problems and develop solutions very quickly and accurately," and that he had "done an outstanding job of managing dispatchers and towers while reducing costs."

One of the train dispatchers supervised by Padilla was Michael Barletta. Padilla testified that Barletta, who was over 60 years of age, had done an "excellent job." However, according to Padilla, Boni thought that Barletta was "too old for the job." Padilla testified that, beginning in mid to late 1986, Boni suggested that Barletta should be demoted, and that, in July of 1987, Boni insisted that Padilla demote Barletta. On July 28, 1987, Padilla demoted Barletta.

In October of 1987, Padilla travelled with Nelson on a business trip to London. Padilla testified that, during the trip, Nelson asked him "what was going on with this Boni-Barletta business." Padilla told Nelson that Boni had insisted "that Barletta was too old and too slow," and that Boni had "wrongly disqualified Barletta." According to Padilla, Nelson told him to "work it out with Boni," and Nelson "didn't really want to hear it any more."

In January of 1988, Barletta filed a charge with the EEOC, alleging age discrimination. After the EEOC

commenced an investigation of the charge, an investigator interviewed Metro-North employees. Padilla was scheduled for an interview on April 6, 1988, but a major train accident occurred on that day. Padilla testified that he told Nelson that he was scheduled for an EEOC interview concerning the charge by Barletta, and that Nelson told him to reschedule the interview because he was needed to respond to the train accident.

Padilla's interview was moved to April 7, 1988, and, on that day, he met with the EEOC investigator. Karen Timko, one of Metro-North's in-house attorneys, also attended the interview. In an affidavit, Padilla asserted that, even though Barletta had "performed his job satisfact[orily]," Boni had insisted that Barletta be removed from his job. According to Padilla, Boni had stated that "Barletta had old working habits" and that "some of these old guys can't stand the stress because the jobs are more pressurized than they ever were before." In the affidavit, Padilla concluded, "I don't know the reason that Boni decided to disqualify Barletta for lack of performance but I don't think it was because of Barletta's age." Padilla testified at trial that this statement was untrue, and that he had made it to "save [his] job."

According to Padilla, Boni angrily approached him after the interview and told him that he had been "disloyal" and that he was "all done." Later that month, Boni again threatened Padilla that he was "all done" and that he was "going to get [him] for cooperating and being disloyal." Patrick McMahon, another Metro-North employee, testified that he had overheard this conversation, and that Boni had told Padilla, "[I]f you don't stop cooperating with them guys downtown, I'll take care of you. . . . I don't even have to do it myself,

[I'll] get [Marijanke] Badurina [or another employee] to do it."

In February of 1987, Marijanke Badurina had been hired by Metro-North as a financial analyst to review the budget of the transportation department. At that time, the transportation department had four units: manpower control, tower operations, field operations, and the OCC. In the course of her review of the budgets of the manpower control and tower operations units, Badurina found problems in the administrative practices of those units. For instance, at the manpower control unit, Badurina found that employees often were working only about four days per week even though they were being paid for working five days. These payroll problems cost Metro-North millions of dollars. Nonetheless, none of the managers in the manpower control unit were demoted as a result of Badurina's findings, and the unit was given additional resources to correct the problem.

In her examination of the budget of the OCC, Badurina analyzed the OCC's weekly time sheets, which had been reviewed and approved by Andrew Favilla, one of Padilla's deputies at the OCC. Padilla himself did not routinely review these time sheets. In April of 1988, Badurina discovered through her examination of the time sheets that some OCC employees improperly had been using sick days to extend their two-day rest periods. Badurina told Boni about her findings, without first discussing them with anyone at the OCC. On May 3, 1988, Boni and Badurina discussed the problem with Nelson.

On May 4, 1988, Nelson held a meeting with Padilla. Padilla testified that this was the first time that he had been notified of the problem found in the OCC's payroll practices, and that he was unable to answer many of

Nelson's questions because he had delegated the task of reviewing the weekly time sheets to Favilla. At the end of the meeting, Nelson placed Padilla on suspension, pending the outcome of an expanded investigation of the OCC's administrative practices. Nelson directed David Dieck, Metro-North's director of budgets and performance analysis, to conduct the investigation.

On May 9, 1988, Padilla filed a charge with the EEOC, alleging that Metro-North had suspended him in retaliation for his participation in the EEOC's investigation of Barletta's age discrimination charge. On May 10th, Nelson learned that Padilla had filed the charge with the EEOC.

On May 13, 1988, Nelson received a summary of findings from Dieck regarding his investigation into the OCC's administrative practices. Dieck's report confirmed that employees improperly had "coupled" sick days with rest days. The report also indicated that other administrative practices of the OCC needed to be corrected.

Nelson testified that he made the final decision to demote Padilla in the middle of May. On June 10, 1988, Nelson notified Padilla that he was being demoted from his position as superintendent of train operations. Nelson testified that he demoted Padilla because of the mismanagement at the OCC and because Padilla had become "withdrawn" and had "show[n] less interest in the job." Nelson asserted that Padilla's participation in the EEOC's investigation of Barletta's charge of age discrimination played no role in his decision to demote Padilla.

After his demotion, Padilla exercised his union rights to return to his former position as a train dispatcher. His

salary decreased from about $65,800 as superintendent of train operations to about $45,000. Boni also was removed from his position as general superintendent of transportation, and was replaced by Richard Sinigiani. Favilla subsequently was promoted to Padilla's former position as superintendent of train operations.

On December 7, 1988, Padilla filed a complaint in the district court. In his complaint, Padilla alleged that Metro-North violated section 4(d) of the ADEA, 29 U.S.C. § 623(d), by demoting him in retaliation for his participation in the EEOC's investigation of Barletta's age discrimination charge. The EEOC subsequently filed a complaint in the district court, alleging that Metro-North violated the ADEA by demoting Padilla. The two actions were consolidated in March of 1990, and a jury trial commenced in June of 1994. On June 30, 1994, the jury returned a verdict finding that Metro-North had willfully retaliated against Padilla because of his participation in the EEOC's investigation of Barletta's charge.

Following the verdict, Metro-North moved for judgment as a matter of law, claiming that the evidence was insufficient to support the jury's findings of retaliation and willfulness. In addition, Padilla moved in the district court for equitable relief consisting of reinstatement or, in the alternative, front pay. In September of 1994, the district court conducted an evidentiary hearing in connection with Padilla's motion for equitable relief. The district court received affidavits and allowed cross-examination at the hearing. In an affidavit, Padilla stated that his former position as superintendent of train operations was "so specialized as to be virtually unique" and that "[t]here are no comparable positions in other industries." He asserted that his "skills at that position are so

specialized that [he] would be extremely unlikely to find any position elsewhere at comparable pay."

On January 5, 1995, the district court denied Metro-North's motion for judgment as a matter of law. The district court found that there was sufficient evidence to sustain the jury's findings of retaliation and willfulness. The district court determined that Padilla was entitled to backpay from the date of his demotion until the entry of judgment in the amount of the difference between the salary received by him as a train dispatcher and the salary he had received as superintendent of train operations. In light of the jury's finding that Metro-North's violation of the ADEA was willful, the district court also determined that Padilla was entitled to liquidated damages through a doubling of the backpay award.

As to prospective relief, the district court denied Padilla's motion for reinstatement. The court stated that, because the relationship between Padilla and Metro-North had been "irreparably damaged by animosity associated with the litigation," reinstatement would be "unworkable." Instead, the court ordered that Padilla receive front pay in the amount of the difference between his salary and the salary paid to the superintendent of train operations until he reaches the age of 67 and will be entitled to receive a full pension.

In March of 1995, Metro-North moved, pursuant to Fed. R. Civ. P. 60(b), to vacate the front pay award. On July 21, 1995, the district court denied the motion. The district court first rejected Metro-North's contention that Padilla was not entitled to front pay under the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995). Although Metro-North argued that Padilla would have been demoted in

any event due to the false statement that he had made to the EEOC during its investigation of Barletta's charge, the district court found that there was "no adequate basis in the record . . . for a finding that Metro-North, had it known that Padilla had not given his honest opinion to the EEOC investigators, would have terminated or demoted him for that reason." The district court also rejected Metro-North's argument that Padilla was not entitled to front pay because he had failed to mitigate his damages. The district court found that, although Padilla did not seek out other employment, there was "no convincing evidence that Padilla, now in his forties . . . would be able to find work commensurate with his skills at a salary equal to what he received as Superintendent of Train Operations." (Quotation omitted and alteration in original).

On September 21, 1995, the district court entered an amended judgment,[1] ordering that Padilla receive back-pay for the period from June 10, 1988 to June 30, 1994 in the sum of $132,706.87 plus interest. In addition, the district court ordered that Padilla receive $108,720 plus interest as liquidated damages. The district court also awarded Padilla as "front pay, for as long as he remains a Metro-North employee, commencing July 1, 1994, and ending when, during his sixty-seventh year, he becomes entitled to receive a full pension, . . . the difference between his salary and the salary then payable to the Superintendent of Train Operations."[2] This appeal followed.

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[1] The district court initially entered judgment on March 21, 1995.

[2] Padilla, who was born in 1952, will reach the age of 67 in the year 2019.

DISCUSSION

I. Sufficiency of the Evidence

Metro-North argues that there was insufficient evidence to support the jury's findings that Padilla was demoted in retaliation for his participation in EEOC proceedings and that the retaliation was willful. We disagree.

Judgment as a matter of law is proper "when there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or [where there is] such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [the movant]." *Logan v. Bennington College Corp.*, 72 F.3d 1017, 1022 (2d Cir. 1995) (quotation omitted and alterations in original). We must view "the evidence in the light most favorable to [the non-movant], and [give him] the benefit of all reasonable inferences from the evidence that the jury might have drawn in his favor." *Id.*

A. Retaliation

Metro-North contends that Padilla did not carry his burden on "the ultimate issue: the sufficiency of the evidence that discrimination or retaliation 'caused' [Padilla's demotion]." A plaintiff asserting a retaliation claim "has the ultimate burden of persuasion to demonstrate that the challenged employment decision was the result of intentional discrimination." *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995) (quotation omitted). To satisfy this burden, the plaintiff must show that "a retaliatory motive play[ed] a part in the adverse

employment actions." *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1254 (2d Cir. 1987) (quotations omitted and alteration in original). "[T]he plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors." *Cronin*, 46 F.3d at 203.

In the present case, we think that a reasonable jury could have found that Metro-North demoted Padilla because of his participation in the EEOC's investigation of Barletta's age discrimination charge. As superintendent of train operations, Padilla had received favorable reviews of his performance. A performance evaluation prepared in August of 1987 listed his overall rating as "Above Job Expectations." However, Padilla testified that, in July of that year, he was directed by Boni to demote Barletta. In October of 1987, while on a business trip, Padilla told Nelson that Barletta had been "wrongly disqualified" because Boni thought he was "too old." Then, on April 6, 1988, according to Padilla, he told Nelson that he would be giving a statement to the EEOC in connection with Barletta's charge of discrimination. On May 4, 1988, Nelson suspended Padilla, and, on May 10th, Nelson learned that Padilla had filed a retaliation charge with the EEOC. On June 10, 1988, Nelson demoted Padilla.

Although Nelson asserted that Padilla was demoted because he had become "withdrawn" and because of his mismanagement of the OCC, the jury could have found that Metro-North demoted him because of his participation in the EEOC's investigation of Barletta's charge. First, Metro-North failed to show that Padilla had become withdrawn and that he had demonstrated a lack

of interest in his work. In addition, although Badurina's budget analysis revealed that there were administrative problems at the OCC, when she previously had detected problems in the administrative practices of other units she first had met with managers of those units to attempt to resolve the problems. After discovering the problems at the OCC, however, Badurina did not allow Padilla an opportunity to provide a solution. Moreover, even though problems in the manpower control unit had cost Metro-North millions of dollars, no employees had been demoted in response. In contrast, even though the problems in the OCC had only cost Metro-North thousands of dollars, Padilla was demoted. In addition, Nelson acknowledged that he knew of Padilla's retaliation charge prior to demoting him, and, in view of Padilla's testimony of his conversations with Nelson in October of 1987 and on April 6, 1988, the jury could have found that Nelson knew of the content of Padilla's statement to the EEOC prior to suspending him. Boni's repeated threats to Padilla in April of 1988 also indicated that Padilla's position as superintendent of train operations was in jeopardy as a result of his participation in the EEOC's investigation. Accordingly, we think that there was sufficient evidence to support the jury's conclusion that Padilla's demotion was for purposes of retaliation.

B. Willfulness

Metro-North also argues that there was insufficient evidence to support the jury's finding of willfulness. We disagree. The ADEA provides for the recovery of liquidated damages if there has been a "willful" violation of the act. 29 U.S.C. § 626(b). "A violation is willful if the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the

ADEA." *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1571 (2d Cir. 1989) (quotations omitted and alteration in original).

In the present case, Nelson acknowledged that he was "aware that there are federal laws that prohibit discrimination in employment" and "that it's a violation of law to take action against an employee who engages in activity protected by that law." In addition, Nelson conceded that he knew that "giving a statement to the [EEOC] is a protected activity under the law." Accordingly, because Nelson knew that it was illegal for him to demote Padilla in retaliation for Padilla's participation in EEOC proceedings, the jury was entitled to find that Nelson's retaliatory conduct was willful.

Metro-North, however, contends that the jury was precluded from finding that Nelson's actions were willful because Nelson testified that he "consulted with the Metro North legal department, with the attorneys, given the fact that Mr. Padilla had filed an action, and on their advice, agreed that [he] would do nothing further until the EEOC had completed their expedited review of the complaint." Metro-North relies on the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Thurston*, company officials had sought legal advice and had consulted with union officials before implementing a new employee transfer plan, and the Court held that "[t]he record makes clear that [company] officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." *Id.* at 129.

Although Metro-North contends that the record here also shows that Nelson acted reasonably and in good faith in attempting to determine whether Padilla's demo-

tion would violate the law, we do not agree. Nelson testified that he consulted with lawyers at Metro-North. However, Nelson did not testify that Metro-North's lawyers told him that Padilla legally could be demoted, nor did he indicate that he in good faith relied on any such advice in taking action against Padilla. Accordingly, the mere fact that Nelson may have consulted with Metro-North's legal department does not demonstrate that he acted in good faith in demoting Padilla.

II. Front Pay

Metro-North contends that the district court erred in awarding Padilla front pay in the amount of the difference between his salary as a train dispatcher and the salary paid to the superintendent of train operations until he is 67 years of age. We disagree.

A. Padilla's False Statement to the EEOC

Metro-North first argues that the award of front pay was improper because Padilla would have been demoted in any event due to the false statement that he made to the EEOC during its investigation of Barletta's age discrimination charge. In *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), the Supreme Court held that, as a general rule, an award of front pay is not an appropriate remedy for a violation of the ADEA where an employer later discovers evidence of wrongdoing by its employee "of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Id.* at 886-87.

Metro-North argues that the misconduct in the present case consists of Padilla's admittedly false statement to the EEOC. Padilla had stated in an affidavit, "I don't

know the reason that Boni decided to disqualify Barletta for lack of performance but I don't think it was because of Barletta's age." Metro-North contends that Padilla should be precluded from receiving front pay because "it would have demoted him from his managerial responsibilities 'in any event and upon lawful grounds' for his perjury."

However, we agree with the district court that "[t]here is no adequate basis in the record . . . for a finding that Metro-North, had it known that Padilla had not given his honest opinion to the EEOC investigators, would have terminated or demoted him for that reason." In an affidavit, Nelson stated that he was "troubled by the prospect of the Court's ordering Metro-North to return an admitted perjurer to a relatively high-level supervisory position." In addition, Sinigiani, who had replaced Boni as general superintendent of transportation, stated in an affidavit, "The prospect of the Court's ordering Metro-North to reinstate an admitted perjurer to the Superintendent, Train Operations position is troublesome because I personally could not trust him to tell me the truth." Sinigiani also stated that it was important for him to be able to "rely upon the truthfulness of the [superintendent of train operations]" in connection with "critical record-keeping functions which affect the performance of Metro-North." However, despite their assertions that the prospect of Padilla returning as superintendent of train operations was troubling, neither Nelson nor Sinigiani stated that, if Padilla had remained as superintendent, his making of a false statement to the EEOC would have led to his demotion for that reason alone. Nor is there evidence that Metro-North had a policy in which it demoted managers for making such false statements, or that a manager had ever been demoted for

this reason in the past. Because Metro-North does not show that Padilla's "wrongdoing was of such severity that [he] in fact would have been [demoted] on those grounds alone," *id.*, Padilla's false statement to the EEOC did not preclude the award of front pay.

B. Mitigation

Metro-North also argues that Padilla was not entitled to front pay because he failed to undertake reasonable efforts to mitigate his damages. We reject this contention. "A victim of employment discrimination has the same duty to mitigate his damages as any victim of a tort or breach of contract." *Clarke v. Frank*, 960 F.2d 1146, 1152 (2d Cir. 1992) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 & n.15 (1982)). Under this duty, a claimant is required to "use *reasonable diligence* in finding other *suitable* employment." *Id.* (quoting *Ford Motor Co.*, 458 U.S. at 231) (emphasis in original).

In the present case, Padilla remained at Metro-North as a train dispatcher after his demotion. In an affidavit dated September 12, 1994, Padilla stated that his former position as superintendent of train operations was "so specialized as to be virtually unique" and that "[t]here are no comparable positions in other industries." Padilla further stated:

> The only comparable positions in the New York area are to be found (one each) at Amtrak, New Jersey Transit and the Long Island Railroad. There is no reason to believe that any one of those positions is now or will soon be available, or that it would be given to an outsider even if it were available.

Padilla concluded: "In short, the position for which I am uniquely qualified is the one from which I was illegally

demoted. My skills at that position are so specialized that I would be extremely unlikely to find any position elsewhere at comparable pay."

Metro-North argues that Padilla's efforts at mitigation were insufficient because he failed to look for a position that was comparable to his former position as superintendent of train operations and instead simply remained at Metro-North as a train dispatcher. However, Metro-North bore the burden of showing that comparable positions were available for Padilla. *See id.* ("The employer bears the burden of proving that suitable work existed, and that the employee did not make reasonable efforts to obtain it."). Metro-North failed to provide any evidence that suitable work existed for Padilla, who had only a high-school education and had worked solely for the railroads since the age of 22. In view of the absence of evidence that suitable work existed for him and in view of his unique and narrow work qualifications, Padilla's failure to attempt to find a position comparable to that of superintendent of train operations did not constitute a failure to mitigate his damages. Moreover, given the lack of evidence of other opportunities available to Padilla, his decision to assume the position of train dispatcher at Metro-North after his demotion was reasonable mitigation. Accordingly, even though Padilla did not actively seek alternative employment, he acted reasonably in mitigating his damages.

C. Duration of Front Pay Award

Finally, Metro-North contends that the duration of the front pay award granted by the district court to Padilla "is grossly out of line with the discretion that has been exercised [by federal courts in the past] in awarding front pay." We disagree.

This Court has encouraged district judges "to fashion remedies designed to ensure that victims of age discrimination are made whole." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984). We have stated that, in cases where "the employer-employee relationship may have been irreparably damaged by animosity associated with the litigation," *id.*, reinstatement may not be possible, and "a reasonable monetary award of front pay is necessary as equitable relief . . . appropriate to effectuate the purposes of [the act]," *id.* (quotation omitted and alterations in original). A front pay award "serves a necessary role in making victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment." *Id.* at 729.

In the present case, the district court awarded Padilla front pay in the amount of the difference between his salary as a train dispatcher and the salary paid to the superintendent of train operations until he reaches the age of 67. The district court determined that front pay in this amount and for this period of time was necessary because there was "no convincing evidence that Padilla, now in his forties . . ., would be able to find work commensurate with his skills at a salary equal to what he received as Superintendent of Train Operations." We agree that Padilla "has no reasonable prospect of obtaining comparable alternative employment." *Id.* Padilla has only a high school education and his vocational experience has been confined primarily to serving as a dispatcher and a supervisor of dispatchers in the railroad industry. Padilla was able to obtain a salary of approximately $65,800 by developing these unique and narrowly focused skills, and it is very unlikely that he will

be able to find alternative employment at this salary. Although Padilla indicated that one position comparable to that of superintendent of train operations exists at three other railroad companies in the New York area, there is no indication that he would be able to obtain one of these positions. Accordingly, the front pay award by the district court was necessary to make Padilla whole after his demotion.

We acknowledge that the award of front pay in this case is for a lengthy period of time—the district court ordered that Padilla receive front pay from July 1, 1994 until he becomes eligible at the age of 67 to receive a full pension. This award entitles Padilla to receive front pay for a period of well over 20 years. However, this Court and other circuits previously have affirmed awards of front pay for substantial periods of time when necessary to provide whole relief for victims of employment discrimination. *See, e.g., Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189 (2d Cir.) (affirming front pay award for a period of 17 years in the total amount of $667,000), *cert. denied*, 506 U.S. 826 (1992). In view of the unique circumstances of this case, we think that the district court properly exercised its discretion in awarding front pay to Padilla until he reaches the age of 67.

CONCLUSION

In view of the foregoing, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 8659 (LMM)
Filed September 21, 1995

STEPHEN M. PADILLA,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

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89 Civ. 2113 (LMM)
95,0562

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

AMENDED JUDGMENT

These consolidated actions came on for trial before this Court and a jury, Hon. Lawrence M. McKenna, District Judge,

presiding, and the issues having been duly tried and the jury having rendered its verdict.

It is Ordered and Adjudged and Decreed as follows:

1. That plaintiff Stephen M. Padilla recover of defendant Metro-North Commuter Railroad, as stipulated compensatory damages for lost back pay from June 10, 1988 to June 30, 1994, the date of the verdict herein, the sum of $108,720, with stipulated interest in the sum of $23,986.84, for a total of $132,706.87, with interest thereon at 4% per annum from June 30, 1994;

2. That plaintiff Stephen M. Padilla recover of defendant Metro-North Commuter Railroad, as liquidated damages for its willful violation of his rights, the stipulated sum of $108,720, with interest thereon at 4% per annum from June 30, 1994;

3. That plaintiff Stephen M. Padilla, as equitable relief in the form of front pay, for as long as he remains a Metro-North employee, commencing July 1, 1994, and ending when, during his sixty-seventh year, he becomes entitled to receive a full pension, recover of Metro-North, contemporaneously with his regular salary payments, the difference between his salary and the salary then payable to the Superintendent of Train Operations;

4. That the firm of Graham, Campaign & McCarthy, P.C. recover of defendant Metro-North Commuter Railroad, as attorneys' fees, the sum of $132,265.00, with interest at 4% per annum from February 21, 1995;

5. That defendant Metro-North Commuter Railroad distribute within three (3) months of the date of entry of judgment, to all managers in its employ who report directly to its President, the statement attached hereto as Exhibit A. All such managers are to sign a copy of this statement as an acknowledgment that they have read it. These signed copies are to be returned promptly to the EEOC;

6. That the Court shall retain jurisdiction to enforce any portion of this judgment;

Dated: New York, New York
September 12, 1995

/s/ Lawrence M. McKenna
Lawrence M. McKenna

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 8659 (LMM)
Filed March 21, 1995

STEPHEN M. PADILLA,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

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89 Civ. 2113 (LMM)
95,0562

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

JUDGMENT

These consolidated actions came on for trial before this Court and a jury, Hon. Lawrence M. McKenna, District Judge,

presiding, and the issues having been duly tried and the jury having rendered its verdict.

It is Ordered and Adjudged and Decreed as follows:

1. That plaintiff Stephen M. Padilla recover of defendant Metro-North Commuter Railroad, as compensatory damages for lost back pay from June 10, 1988, and the sum of $108,720, with interest at 4% from June 10, 1988 to the date of entry of judgment.

2. That plaintiff Stephen M. Padilla recover of defendant Metro-North Commuter Railroad, as liquidated damages for its willful violation of his rights, the sum of $108,720.

3. That plaintiff Stephen M. Padilla, as equitable relief in the form of front pay, for as long as he remains a Metro-North employee, commencing with the entry of judgment herein and ending when, during his sixty-seventh year, he becomes entitled to receive a full pension, recover of Metro-North, contemporaneously with his regular salary payments, the difference between his salary and the salary then payable to the Superintendent of Train Operations.

4. That the firm of Graham, Campaign & McCarthy, P.C. recover of defendant Metro-North Commuter Railroad, as attorneys' fees, the sum of $132,265.00.

5. That defendant Metro-North Commuter Railroad distribute within three (3) months of the date of entry of judgment, to all managers in its employ who report directly to its President, the statement attached hereto as Exhibit A. All such managers are to sign a copy of this statement as an acknowledgment that they have read it. These signed copies are to be returned promptly to the EEOC.

7. That the Court shall retain jurisdiction to enforce any portion of this judgment.

Dated: New York, New York
March 21, 1995

/s/ Lawrence M. McKenna
Lawrence M. McKenna

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

88 Civ. 8659 (LMM)

STEPHEN M. PADILLA,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

---

89 Civ. 2113 (LMM)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

MEMORANDUM AND ORDER

MCKENNA, D.J.

1.

Defendant's motion in the above cases for judgment as a matter of law (Fed. R. Civ. P. 50(b)) or, in the alternative, for a new trial (Fed. R. Civ. P. 59), is denied.

The complaints assert that defendant retaliated against plaintiff Padilla in violation of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 623(d) (1985).[1]

To establish a *prima facie* case of retaliation in violation of the ADEA, a plaintiff employee must show "[1] that he was engaged in a protected activity; [2] that the employer was aware of that activity; [3] that there occurred an employment action adverse to the employee; and [4] that there existed a causal connection between the protected activity and the adverse employment action." *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990).

That plaintiff Padilla was engaged in protected activity in supplying, on April 7, 1988, an affidavit regarding the Barletta age discrimination claim to a representative of the EEOC, and in filing, on May 9, 1988, a retaliation claim against Nelson with the EEOC after he was suspended with pay on May 4, 1988, and that Padilla's demotion by Nelson, on June 10, 1988, was an employment action adverse to Padilla, cannot, on the evidence, be reasonably disputed.

Evidence was introduced from which the jury could conclude that Padilla, on April 4 or 5, 1988, prior to supplying the affidavit to the EEOC, had told Nelson that he had been contacted by the EEOC and was to be questioned concerning the Barletta matter by a representative of the EEOC. (*See* Tr. at 68-69.) There was also evidence from which the jury could conclude that, before deciding to demote Padilla, Nelson knew that Padilla had complained to the EEOC asserting Nelson's retaliation against Padilla—in the form of suspension with pay—for cooperating with the EEOC's investigation of the Barletta matter. (*See* Tr. 297-98.) Thus, the jury could have found, on the evidence, that Nelson was aware of Padilla's protected activity.

Finally, there was evidence from which the jury could infer a causal connection between Padilla's protected activity and

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[1] The cases were consolidated for trial. On June 30, 1994, the jury found for plaintiff Padilla, and that defendant's violation of law was willful.

his demotion. Nelson testified that he made the "final" decision to demote Padilla "in the middle of May [1988]." (Tr. 293.) Later in the trial, he testified that "by the 10th and 11th [of May, 1988] I concluded, on the basis of the first hearing, the first meeting that I had [on May 4, 1988], that [Padilla] was not capable of properly managing [the Operations Control Center] and I had lost confidence in him. My preliminary decision had been reached by then." (*Id.* at 620.) Not earlier than May 13, 1988, however, Nelson received a further report of an investigation by David Dieck, Director of Budgets and Performance Analysis for defendant, concerning payroll practices within Padilla's jurisdiction, requested by Nelson at the May 4, 1988 meeting "before I made any final determination." (*Id.* at 569.)

The jury could have concluded on all of the evidence that Nelson, already aware that Padilla was talking to the EEOC about the Barletta matter, was made aware, on May 10, 1988, that Padilla had filed with the EEOC a retaliation claim arising out of Nelson's May 4, 1988 suspension of Padilla; that on May 10 (or 11), 1988, without yet having received the Dieck report, Nelson determined to demote Padilla because of Padilla's EEOC complaint; and that Nelson was motivated by Padilla's protected activities in thus finally determining to demote Padilla. Defendant's arguments to the effect that the evidence can or should be read differently, of course, are beside the point: it was for the jury to determine what inferences to draw from the evidence. Thus, the jury could have found, on all of the evidence,[2] that there was a causal connection between Padilla's protected activity and his demotion.

Since the jury could have found that plaintiffs had established a *prima facie* case of retaliation, "the burden of production shift[ed] to the defendant to provide a non[retaliatory]

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[2] The Court's discussion in this Memorandum and Order of the evidence introduced at trial and of the inferences that could be drawn from it is not intended to be complete. Padilla's prior record and the timing of the events at issue and of Nelson's learning of them are all significant.

rationale for its action." *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 142 (2d Cir. 1993), *cert denied*, 114 S. Ct. 1189 (1994). Defendant certainly offered evidence of non-retaliatory reasons for the demotion of Padilla. Whether or not defendant actually demoted Padilla for those reasons, however, was a question for the jury. And the jury's "disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993). Upon the jury's rejection of the proffered non-retaliatory reasons, of course, the plaintiffs retained the burden of proof. *Saulpaugh*, 4 F.3d at 142. Rejection of the proffered non-retaliatory reason permits, although it does not require, the jury "to infer the ultimate fact of intentional discrimination." *St. Mary's*, 113 S. Ct. at 2749 (footnote omitted); *see also DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170 (2d Cir. 1993). The jury is, of course, free to find that ultimate fact on the basis of circumstantial as well as direct evidence. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). While a plaintiff bears the burden of proving discriminatory intent by a preponderance of the evidence, he "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Saulpaugh*, 4 F.3d at 142 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1980)).

Here then, even if there were no more than plaintiffs' establishment of a *prima facie* case and the jury's disbelief of defendant's proffered non-retaliatory reasons for the demotion of Padilla, the Court could not and does not conclude that there was "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . such an overwhelming amount of evidence in favor of the movant that rea-

sonable and fair minded men could not arrive at a verdict against him." *Song v. Ives Labs.. Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992) (*quoting Mattivi v. South African Marine Corp.*, 618 F.2d 163, 168 (2d Cir. 1980)).

The same must be said of defendant's claim that there was insufficient evidence to support the jury's finding that the demotion of Padilla was willful. Nelson was "aware that it's a violation of law to take action against an employee who engages in activity protected by that law" (tr. at 367), and that "giving a statement to the [EEOC] is a protected activity under the law." (*Id.* at 368.) The jury could find on the evidence, not only that defendant, through Nelson, did take action against Padilla because of his protected activity, but that Nelson knew that that action was a violation of the law. The jury was thus entitled to find that such conduct was "willful." *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708-10 (1993). Defendant's "reluctance to acknowledge its reliance on the forbidden factor should not cut against imposing a penalty." *Id.* at 1709-10.

Defendant's motion, pursuant to Fed. R. Civ. P. 50(b), for judgment as a matter of law, is accordingly denied.

Defendant's motion, pursuant to Fed. R. Civ. P. 59, for a new trial, is also denied. The Court does not find that "the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice." *Song*, 9S7 F.2d at 1047 (*quoting Smith v. Lightening Bolt Productions, Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)).

2.

Plaintiff Padilla seeks the equitable relief of reinstatement to the position of Superintendent of Train Operations. *See* 29 U.S.C. § 626(b).

Defendant argues, first, that the Court should deny plaintiff Padilla *all* relief on the ground that Padilla has "unclean hands" because of his testimony that the affidavit he submitted to the EEOC was false in stating that Edmund Boni

had not discriminated against Barletta. As the EEOC points out, however, that statement was only a conclusion or opinion, and Padilla had "otherwise given a truthful factual account of the circumstances regarding the Barletta matter." (EEOC Mem. of Aug. 10, 1994 at 10.) It is the EEOC's view, as well, that the statement "did not affect or hinder the EEOC investigation of Barletta." (*Id.*) Furthermore, there is some evidence to suggest that the false conclusion may have been put into the affidavit because of fear of retaliation. Nor is there any claim that the false statement was either the reason for Padilla's demotion, or has in any way harmed defendant. The Court does not find that the false statement in Padilla's affidavit affords any basis for the denial of relief.

The Court therefore finds that plaintiff Padilla is entitled to back pay (in this case, where he has remained employed by defendant, the difference between the pay received by him as Superintendent of Train Operations and that since received by him in other jobs subsequent to his demotion) from the date of his termination until the date of entry of judgment, with interest at 4% from June 10, 1988. Further, in light of the jury's finding that defendant's violation of the ADEA was willful, plaintiff Padilla is entitled to liquidated damages through a doubling of the back pay award (without interest). *See Ginsberg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 702 (S.D.N.Y. 1980).

Plaintiff Padilla's request for reinstatement is more problematic. "Reinstatement . . . may not always be possible. For example, there may be no position available for plaintiff at the time of judgment, or . . . the employer-employee relationship may have been irreparably damaged by animosity associated with the litigation." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984) (citations omitted). *See also EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. at 919, 926-27 (S.D.N.Y. 1976) (Weinfeld, J.), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

The present case is one, in the Court's view, where "the employer-employee relationship may have been irreparably damaged by animosity associated with the litigation." *Whittlesey*, 742 F.2d at 728. The case "has been marked by more than the usual hostility between the parties." *Kallir*, 420 F. Supp. at 926.[3] Further, "in this case the job from which plaintiff [Padilla] was [demoted] required a close working relationship between plaintiff and top executives of defendant." *Id.* at 926-27. In the Court's view, reinstatement would, in the present case, be unworkable. If nothing else, "the necessary trust and confidence can never exist between plaintiff and defendant." *Id.* at 927. Accordingly, the Court will not order reinstatement (or the creation of a job at the salary level formerly applicable to Padilla).

However:

> Denial of reinstatement in those situations [where it is not feasible], without an award of reasonable, offsetting compensation, would leave the plaintiff irreparably harmed in the future by the employer's discriminatory discharge, and would permit the defendant's liability for its unlawful action to end at the time of judgment. To prevent this injustice a reasonable monetary award of front pay is necessary as "equitable relief * * * appropriate to effectuate the purposes of [the act]."

Whittlesey, 742 F.2d at 728 (quoting 29 U.S.C. § 626(b)). That reasoning in general applies equally to a demotion. Unlike the plaintiff in *Whittlesey*, however, or the plaintiff in *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992), plaintiff Padilla remains employed by defendant, albeit at a reduced salary due to his wrongful demotion. A full front pay award would be unjust to defendant if it had to pay plaintiff, as well, the salary he now

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[3] The Court does not refer to hostility between counsel, whose relations have been wholly professional.

receives; at the same time, plaintiff should not be required to resign.[4]

The Court therefore orders that plaintiff be paid a salary equal to that paid to him as Superintendent of Train Operations from the date of entry of judgment until such time during his sixty-seventh year (see Transcript, September 15, 1994, at 13) as he is entitled to receive a full pension.[5] If, however, plaintiff Padilla should resign or die, such payments may be discontinued.

Plaintiff EEOC also asks for equitable relief. The EEOC may prepare a written statement of the substance of the law regarding its duties under the ADEA, the seriousness with which the law regards retaliation against employees either cooperating with an EEOC investigation or filing retaliation claims with the EEOC, and the penalties provided by law for retaliation against such employees, which is to be distributed to all managers in defendant's employ who report directly to the President, who are to sign a copy of such statement in acknowledgment that they have read it and then return such copy to the EEOC. The statement is not to refer to the present case or to Nelson, Padilla, or any present or former employee of defendant, and is to be distributed within three months of the date of entry of judgment.

Plaintiffs will submit a proposed judgment consistent with this Memorandum and Order, on notice to defendant, not later than January 20, 1995. Any application for attorneys' fees should be submitted at the same time, so that any such award

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[4] There is no convincing evidence that Padilla, now in his forties (tr., September 15, 1994, at 26), would be able to find work commensurate with his skills at a salary equal to what he received as Superintendent of Train Operations.

[5] The Court's decision is, of course, dependant on the availability of this remedy. Should a higher court, on review, find it is not available, Padilla would be "entitled to unhappy reinstatement, as would be necessary to redress his grievance and to enforce the [ADEA]." *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1331 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984).

may be made a part of the judgment. The judgment may provide that the Court retains jurisdiction to enforce it.

Dated: New York, New York
January 3, 1995

SO ORDERED.

/s/ Lawrence M. McKenna
LAWRENCE M. MCKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 8659 (LMM)

STEPHEN M. PADILLA,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD

Defendant.

---

89 Civ. 2113 (LMM)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

MEMORANDUM AND ORDER

MCKENNA, D.J.

By Memorandum and Order dated October 23, 1992, the Court denied the motion of Metro-North Commuter Railroad ("Metro-North") for summary judgment dismissing the com-

plaints in the above actions. By letter dated September 14, 1993, Metro-North requested permission to re-move for summary judgment in light of *St. Mary's Honor Center v. Hicks*, ___ U.S ___, 113 S. Ct. 2742 (1993). After conference with counsel, the Court directed that Metro-North might, if it wished, file a new motion for summary judgment in light of *Hicks*, but that plaintiffs' counsel would not have to respond unless directed to do so by the Court.

Hicks does not, in this Court's view, set forth any new law that would lead the Court to change the conclusions reached in its October 23, 1992 Memorandum and Order. The Court of Appeals has recently pointed out that it "read[s] *Hicks* as doing no more than reiterating the longstanding rule that despite shifting burdens of production, a plaintiff always shoulders the ultimate burden of proof." *Saulpaugh v. Monroe Community Hospital*, 4 F.3rd 134, 142 (2d Cir. 1993).

In its October 23, 1992 Memorandum and Order, the Court understood that rule, and focused on what it understood to be the main thrust of Metro-North's argument, that there was no proof that the alleged decisionmaker, Mr. Nelson, was aware of plaintiff Padilla's protected activity. The Court noted that "[a] reasonable jury could find that Mr. Nelson learned of Mr. Padilla's statement [to the Equal Employment Opportunity Commission] and, consequently, demoted him." Mem. & Order at 6. The circumstantial evidence put forward by plaintiffs is sufficient also, in the Court's view, to lead a reasonable jury to find that Metro-North's asserted reason for the adverse employment action against Mr. Padilla was pretextual and to find that plaintiffs had sustained their ultimate burden of proof of discrimination by a preponderance of the evidence. (A reasonable jury could also, of course, find otherwise.) As was noted in *Saulpaugh*, the Court in *Hicks* "emphasizes that a fact-finder's disbelief of a defendant's proferred rationale may allow it to infer the ultimate fact of intentional discrimination in some cases." 4 F.3rd at 142 (citing *Hicks*, ___ U.S. at ___, 113 S. Ct. at 2749). And, of course, "[a]s in any lawsuit, the plaintiff may prove his case

by direct or circumstantial evidence." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

Metro-North's motion (considered as a motion for reconsideration) is granted, and, upon reconsideration, the Court adheres to the conclusions of its Memorandum and Order of October 23, 1992; considered as a motion for summary judgment, plaintiffs need not respond, and the motion is denied.

The parties will complete discovery by December 31, 1993 and file a pretrial order (and related materials) by January 31, 1994.

Dated: New York, New York
November 19, 1993

SO ORDERED.

/s/ Lawrence M. McKenna
LAWRENCE M. MCKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 8659 (LMM)

STEPHEN M. PADILLA,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

---

89 Civ. 2113 (LMM)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—against—

METRO-NORTH COMMUTER RAILROAD,

Defendant.

MEMORANDUM AND ORDER

MCKENNA, D.J.

Plaintiff Stephen M. Padilla commenced the first action in May 1988, challenging his removal by Metro-North Commuter Railroad ("Metro-North"), a subsidiary of the

Metropolitan Transit Authority, from the position of Superintendent, Train Operations, under the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621 *et seq.* (1988). In addition, Mr. Padilla alleges a pendent state law claim based on the New York Human Rights Law (the "NYHRL"), N.Y. Exec. Law § 296 *et seq.* (McKinney 1982 & Supp. 1992). The Equal Employment Opportunity Commission (the "EEOC") brought the second action, alleging that Metro-North retaliated against Mr. Padilla for having engaged in protected activity in violation of section 4(d) of the ADEA, 29 U.S.C. § 623(d) (1988). Mr. Padilla and the EEOC are referred to collectively as "Plaintiffs." Specifically, Plaintiffs allege that Mr. Padilla was demoted as a result of statements he made to the EEOC during an interview conducted on April 7, 1988 regarding the termination of a Metro-North employee. Defendant Metro-North moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor. For the reasons that appear below, Defendant's motion is denied.

Summary Judgment

Summary judgment should be granted only where "there is no genuine issue as to any material fact" and a party is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court is not to weigh evidence and decide the truth, but rather to determine whether or not there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court must draw all reasonable inferences, and resolve all ambiguities, in favor of the nonmoving party. *Cargill, Inc. v. Charles Kowsky Resources, Inc.*, 949 F.2d 51, 55 (2d Cir. 1991); *Schwabenbauer v. Board of Education*, 667 F.2d 305, 313 (2d Cir. 1981). A motion for summary judgment must be denied if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

Discussion

Substantive prohibitions under the ADEA mirror those under Title VII of the Civil Rights Act of 1964. *Lorillard v. Pons*, 434 U.S. 575, 584 & n.12 (1978). The evidentiary framework measuring discrimination under the ADEA borrows from Title VII case law. *Lowe v. Commack Union Free School District*, 886 F.2d 1364, 1369 (2d Cir. 1989). Both the ADEA and the NYHRL "prohibit employers from making employment decisions 'because of' age or other prohibited factors." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1185 (2d Cir. 1992). Resolution of this summary judgment motion involves the same analysis for both the ADEA claim and the NYHRL[1] claim.

The plaintiff in an employment discrimination case alleging retaliation bears the initial burden of proving, by a preponderance of the evidence, a *prima facie* case of discrimination. If the plaintiff succeeds in this effort, the burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the challenged conduct. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Thereafter, the plaintiff must prove by a preponderance of the evidence that the reason proffered is not the true reason but rather a pretext for the prohibited conduct. "This may be done either by persuading the trier of fact that a discriminatory reason more likely than not motivated the employer, or by persuading the trier of fact that the employer's proffered explanation is unworthy of belief." *Bethlehem Steel*, 958 F.2d at 1181 (citation omitted).

It is agreed by the parties that "the EEOC interviewed Padilla in connection with its investigation of Barletta's charge of age discrimination." (Def.'s Mem. at 11.) However,

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[1] "Because the 'same elements and burdens of proof apply' to a discrimination claim under the ADEA and New York's Human Rights Law, and the two claims are analogous . . . the Court initially will just consider the ADEA claim." *Stein v. McGraw-Hill, Inc.*, 782 F. Supp. 207, 209 n.1 (S.D.N.Y. 1992) (citation omitted).

the parties contest the motives for Mr. Padilla's demotion; Metro-North contends Mr. Padilla was guilty of mismanagement, whereas Plaintiffs allege that Metro-North demoted Mr. Padilla in retaliation for cooperating with an EEOC investigation. Pursuant to the ADEA, retaliation is defined as the following:

> It shall be unlawful for any employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

29 U.S.C. § 623(d) (1988). To establish a *prima facie* case of discriminatory retaliation, a plaintiff must demonstrate: (1) that he or she was engaged in protected activity known by the alleged retaliator; (2) an adverse employment decision; and (3) a causal connection between the protected activity and the adverse decision. *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990).

Metro-North "acknowledge[s] that Padilla's demotion satisfies the second element" of the aforementioned test. (Def.'s Mem. at 14.) Furthermore, Defendant "acknowledge[s] that in making his April 7, 1988 statement to the EEOC Padilla participated in protected activity under § 4(d) of ADEA." (*Id.* at 17.) In support of its motion for summary judgment, Metro-North contends that Mr. Padilla and the EEOC "fail to satisfy the first prong of a *prima facie* case because they cannot come forward with any proof to show that Nelson even knew [Mr. Padilla] had made the statement, much less that Nelson knew what he had said." (*Id.*) The Court does not agree with Metro-North's analysis.

At issue in this motion for summary judgment, then, is whether Mr. Nelson[2] knew of Mr. Padilla's statements made

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[2] Donald N. Nelson was vice president of operations at Metro-North at the time Mr. Padilla made his statement to the EEOC and at the

to the EEOC. Consequently, Mr. Nelson's state of mind is at issue. "[W]here a defendant's intent and state of mind are placed in issue, summary judgment is ordinarily inappropriate." *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991). If a reasonable jury could find that Mr. Nelson knew Mr. Padilla made statements to the EEOC, Mr. Padilla and the EEOC would satisfy the requirements for a *prima facie* case of retaliation.

While Mr. Nelson denies all knowledge of Mr. Padilla's statement to the EEOC,[3] Plaintiffs present circumstantial evidence questioning the credibility of this denial. For example, the affidavit of Ms. Timko suggests that certain Metro-North employees, including Mr. Boni, Mr. Padilla's supervisor, were aware of Mr. Padilla's interview with the EEOC. (Timko Aff. at 12-14.) In addition, Mr. Boni was overheard as threatening Mr. Padilla with an internal audit if he "continue[d] to cooperate with these people downtown," an apparent reference to the EEOC. (McMahon Aff. at 1718.) A reasonable inference could be made that Mr. Boni discussed Mr. Padilla's involvement in the EEOC investigation with Mr. Nelson.[4] Furthermore, the close proximity in time of the internal audit charging Mr. Padilla with mismanagement to Mr. Padilla's April 7, 1988 statement to the EEOC strengthens Plaintiffs' contention that Mr. Padilla's demotion was retaliatory.

Defendant has failed to satisfy its burden by demonstrating that no genuine issue of material fact exists with respect to

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time of the alleged retaliatory demotion. (Nelson Aff. at 6.) In early 1988, Mr. Padilla, as superintendent train operations, reported indirectly to Mr. Nelson, with one person between the two, the general superintendent transportation, Mr. Boni. (*Id.* at 8-9.)

[3] Asked if he was "aware that Mr. Padilla had given an affidavit to the E.E.O.C. with respect to the disqualification of Mr. Barletta," Mr. Nelson responded in the negative. (Nelson Aff. at 65.)

[4] Circumstantial evidence of Mr. Padilla's satisfactory job performance, (Ex. 9 to Graziano Aff.), and Mr. Nelson's knowledge of the EEOC investigation regarding Mr. Barletta's termination, (Nelson Aff. at 58), are examples of other factors which lend support to Plaintiffs' allegations.

the ADEA and the NYHRL claims. A reasonable jury could find that Mr. Nelson learned of Mr. Padilla's statement and, consequently demoted him. While other interpretations are also possible, Defendant has not foreclosed the possibility that Mr. Nelson knew of the statement made to the EEOC. Questions of credibility and truth are matters to be left to the trier of fact. "[J]uries have always been allowed to draw . . . inferences." *Bethlehem Steel*, 958 F.2d at 1185. Drawing all inferences in favor of Plaintiffs, as mandated by *Matsushita Electric Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), the Court finds that Plaintiffs have presented sufficient evidence from which a reasonable jury could return a verdict in their favor. Plaintiffs have raised a triable issue as to whether the articulated reasons for demoting Mr. Padilla were pretextual.

Summary

For the foregoing reasons, Defendant's motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, is denied. The parties will advise the Court in writing, within 21 days of the date hereof, as to how much time is required to complete discovery.

SO ORDERED.

/s/ Lawrence M. McKenna
LAWRENCE M. MCKENNA
U.S.D.J.

Dated: New York, New York
October 23, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt. No: 95-6056
Filed December 13, 1996

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December, one thousand nine hundred and ninety-six.

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellee,

—v—

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Metro-North Commuter.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ BETH J. MEADOR
Beth J. Meador
Administrative Attorney

29 U.S.C. § 623(d)

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. 29 U.S.C. § 626(b)

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provision of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, includ-

ing without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Supreme Court, U.S.
FILED
MAY 15 1997
OFFICE OF THE CLERK

No. 96-1463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT PADILLA'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1463

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v—

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT PADILLA'S BRIEF IN OPPOSITION

INTRODUCTION

Metro-North's petition for a writ of certiorari ("Petition") has been written as if no jury had ever found facts supporting the verdict and as if the Second Circuit had written its opinion far differently from the way it has been officially reported (A1-20).

We deal here first with the manner in which Metro-North has erroneously viewed the facts and then with the manner in which it claims the Second Circuit ruled.

STATEMENT OF THE CASE

Metro-North's recitation of the facts is merely its own version of what happened—a version clearly rejected by the jury. It erroneously refers to its own trial evidence as if it were factual and undisputed by Padilla and it describes Padilla's evidence as "vague and self-serving" (Petition 19).

Lost among what amounts to a defense summation disguised as an objective "statement of the case" are the following items of evidence which the jury was entitled to believe and which, as the Second Circuit properly held, supported the jury's verdict of willful retaliation:

1. In mid-1987, Padilla was Metro-North's Superintendent of Train Operations; his immediate supervisor was General Superintendent Edmund Boni, whose immediate superior was Vice President of Operations Donald Nelson (A3);

2. Padilla's periodic evaluation reports, prepared by Boni and approved by Nelson, were uniformly glowing (A4);

3. In mid-1987, one Michael Barletta, age 61, was an Assistant Chief Train Dispatcher supervised by Padilla; Boni believed that Barletta was too "old" and forced Padilla to "disqualify" him, i.e., to transfer him to another position, without the contractually-required hearing (A4);

4. Barletta filed an age discrimination claim with Metro-North's in-house affirmative action department; just before the investigator was to issue a report finding that Boni had discriminated against Barletta by virtue of the latter's age, Boni suppressed the report (Stipulation at Trial Transcript 221-22);

5. In October of 1987, Padilla told Nelson that he believed that the disqualification of Barletta had been wrong and that Boni had claimed that Barletta was "too old" (A4);

6. In January of 1988, Barletta filed an age discrimination complaint with the EEOC; Nelson was aware of the filing of the complaint before May (Trial Transcript - 595);

7. On April 6, 1988, Padilla told Nelson that he was about to give a statement to the EEOC on the Barletta matter (A5);

8. On April 7, 1988, Padilla gave a statement to the EEOC in which he asserted that Boni had made disparaging remarks about the age of Barletta and other Metro-North employees; because he feared retaliation and in an effort to save his job, Padilla falsely asserted that he did not believe that Boni ordered Barletta's disqualification because of the latter's age (A5);

9. In early April of 1988, Boni called Padilla "disloyal" and said that he would "get him" through his subordinate, one Marijanke Badurina, if he did not "stop cooperating with them guys downtown"—an apparent reference to the EEOC (A5-6);

10. On April 11, 1988 Badurina, who was conducting audits of various Metro-North departments, then began auditing the department Padilla ran; although when conducting audits of other departments she had conferred with their heads and had allowed them to suggest corrections of perceived problems, she did not follow that same procedure with respect to Padilla's department (A6);

11. Before May 4, 1988, Boni and Badurina advised Nelson that there was "mismanagement" in Padilla's department (A6);

12. On May 4, 1988, Nelson met with Padilla, Boni and others about the so-called "mismanagement"; at the end of the meeting, Nelson suspended Padilla pending further investigation into the so-called "mismanagement" (A6-7);

13. On May 9, 1988, Padilla filed a claim with the EEOC alleging that his suspension constituted an act of retaliation against him for having cooperated with it against Metro-North

in the Barletta matter; Nelson learned of this filing on the very next day (A7);

14. On May 13, 1988, Nelson received a report of the results of the "investigation" into Padilla's so-called "mismanagement" of his department—a report which confirmed that "mismanagement"; (A7)

15. On June 10, 1988, Nelson officially demoted Padilla, advising him to exercise his rights under his union contract and to accept a position at Metro-North paying $20,000 less than his current position; Padilla followed that advice (A7-8);

16. Although Badurina's audits of other departments disclosed "mismanagement" costing Metro-North millions of dollars, no head of any such department was disciplined by Nelson in any way; the "mismanagement" in Padilla's department cost only thousands of dollars, yet Padilla was demoted; the heads of those other departments had not been involved in the EEOC investigation into the Barletta age discrimination complaint (A13).

As a result of this testimony and its review of the entire record, the Second Circuit properly held (A13) that "there was sufficient evidence to support the jury's conclusion that Padilla's demotion was for purposes of retaliation."

REASONS FOR DENYING THE WRIT

Metro-North's reasons for granting the writ are based upon its misunderstanding of the record, of the opinions of the courts below and of the traditional purpose of the writ it seeks.

I. THE SECOND CIRCUIT NEITHER ANNOUNCED NOR APPLIED A *PER SE* STANDARD OF LIABILITY

Metro-North claims (Petition 13-10) that the Second Circuit announced and applied a *per se* standard of liability when

affirming the jury's verdict on the retaliation issue. Its claim is erroneous.

First, a mere reading of the Second Circuit's opinion on the liability issue (A11-13) demonstrates that it *announced* no such standard.

Nor did the Second Circuit *apply* a *per se* standard, Metro-North's argument to the contrary being based largely upon its quibble with the weight of the evidence of retaliation—a weight to be measured solely by the jury.

We list here, in no particular order, some of the legal and factual errors which Metro-North has included in its misguided argument on this point.

1. It claims (Petition 14) that the Second Circuit relieved Padilla of proving Nelson's discriminatory intent and his knowledge of Padilla's protected activity. The court did no such thing, since direct evidence by Padilla showed Nelson's knowledge that Padilla was giving a statement to the EEOC in the Barletta age discrimination matter and circumstantial evidence proved Nelson's retaliatory intent.

2. The claim (Petition 13) that the Second Circuit "transformed" a "pretext" case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) into a "*mixed motive*" case under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) is absurd. Metro-North never challenged the District Court's proper charge on this issue,[1] and the jury, having been submitted the case under the "pretext" theory, must be assumed to have obeyed that proper charge. Moreover, the Second Circuit never even cited *Price Waterhouse*, making it disingenuous to assert that the court below relied upon that case, especially since, when presented with this assertion in Metro-North's petition for rehearing, the court in effect disposed of the

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[1] The District Court charged the jury (Trial Transcript 728) that it could not find for Padilla unless "you . . . disbelieve the explanation given by Mr. Nelson for the demotion of Mr. Padilla . . . ."

assertion by denying the petition (A45).[2] Finally, although Metro-North asserts (Petition 13) that "the Second Circuit did not discuss or apply a pretext analysis with respect to Nelson's decisions to suspend and then to demote Padilla," the assertion is refuted by these words in the opinion (A12):

> Although Nelson asserted that Padilla was demoted because he had become "withdrawn" and because of his mismanagement of the OCC, the jury could have found that Metro-North demoted him because of his participation in the EEOC's investigation of Barletta's charge.

These words, and those that follow (A12-13) shriek "pretext."

3. Metro-North claims (Petition 19), with a disregard of the record which can been seen throughout its "statement of the case", that there was insufficient evidence of Nelson's knowledge that Padilla was engaging in "protected activity." The record shows that on April 6, 1988, Padilla *told* Nelson that he was about to give a statement to the EEOC about the Barletta complaint. We do not know what more proof than that is necessary to constitute "sufficient" evidence of Nelson's knowledge.

4. Metro-North seeks (Petition 17-20) to persuade this Court that the Second Circuit applied some novel rule to the effect that a decision maker is saddled with "constructive knowledge" of the illegal animus of a subordinate toward the victim of discrimination. It did no such thing. The Court below never said that Nelson did not intend to retaliate against Padilla and that he should be held to have intended "constructively" to do so because of the retaliatory intent of his subordinate Boni. It held, instead, that the circumstantial evidence was sufficient to show that Nelson himself had that retaliatory intent.

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[2] Thereafter, the Second Circuit denied Metro-North's motion for a stay of the execution of judgment pending the filing and determination of this Petition.

5. Despite Metro-North's contention (Petition 11-12) that the Second Circuit concentrated on "mixed motive" rather than a "pretext", it is clear that it made the following finding with respect to this trial record:

> [A] reasonable jury could have found that Metro-North demoted Padilla because of his participation in the EEOC'S investigation of Barletta's age discrimination charge.

The evidence we have listed above supports that conclusion. Not even harmless error was committed here, much less one deserving this Court's attention.

Recognizing, perhaps, that a petition for a writ of certiorari is enhanced by a showing of a conflict between or among the Circuits on the issues involved, Metro-North claims that the Second Circuit opinion below conflicts with the rulings of other Courts of Appeal on a variety of issues. The claim is mere wishful thinking and is no more than the creation of straw men, misinterpreting the Second Circuit's rulings and then citing cases from other courts ostensibly in conflict. We set forth here some of the many examples of this spurious argument.

1. Erroneously asserting (Petition 14) that the Second Circuit imputed to Nelson the statements and conduct of Boni and Badurina, Metro-North claims that some six other cases, with "almost identical fact situations," hold that the employer was entitled to judgment as a matter of law. Those cases do not, however, involve "almost identical fact situations," Thus:

a. *Wilson v. Stroh Companies, Inc.*, 952 F2d 942 (6th Cir. 1992), a racial discrimination case, involved the firing of Wilson for eight acts of insubordination found by an impartial arbitrator, the firing being recommended by a supervisor concededly not infected by racism and carried out by a general manager likewise uninfected by discriminatory motive; the District Court's grant of summary judmgnent was affirmed.

b. In *Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996), a racial discrimination case, there was no proof at all that Lattimore's racially-biased supervisor participated in any way in the decision to terminate his employment—a decision made solely because he refused to return to work when an impartial medical examination resulted in a finding that he was able to do so.

c. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995), a case dealing with age and sex discrimination as well as retaliation, involved an employee's claim that she had been fired because she had made complaints of age and sex discrimination against her employer; a grant of summary judgment in favor of the employer was affirmed by the Fifth Circuit since it was shown that her poor performance caused her firing and her biased supervisor had no input into the decision to fire her.

d. *Williams v. Williams Electronics, Inc.*, 856 F.2d 920 (7th Cir. 1988), a racial discrimination case, involved the layoff of an employee, pursuant to a reduction in force, who asserted that racially-biased supervisors and co-employees had caused the layoff; a grant of summary judgment in favor of the employer was affirmed by the Seventh Circuit since none of the racially-biased persons had anything to do with the layoff decision which the undisputed proof demonstrated was honestly based upon performance-related considerations.

e. *Mauter v. Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987), an age discrimination case, involved the affirmance of a grant of summary judgment to an employer when it was shown that the age-biased supervisor played no role whatsoever in the termination decision—a decision based upon economic factors unrelated to age.

f. *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984), an age discrimination case, involved the affirmance of a judgment n.o.v. in favor of an employer on grounds similar to those underlying *Ray*,

Williams and *Mauter*—those harboring the bias had no input into the decision to discharge LaMontagne.

None of these cases is similar to this one and thus none is in conflict with it. Here, the decision maker, Nelson, had actual knowledge of Padilla's cooperation with the EEOC and ostensibly demoted him on what the jury was entitled to find was a pretext.

2. In erroneously asserting (Petition 17-19) that the Second Circuit applied a "constructive knowledge" test in order to find the evidence of retaliation sufficient, Metro-North usurps the jury's function of weighing the evidence and then, of course, finds that the evidence—that Nelson himself knew of Padilla's protected activity when he suspended him in early May—was "ambiguous,[3] self serving," and "far too speculative". It finds the Second Circuit's ruling on this portion of the proof to be in conflict with other cases, none of which is similar to this case and thus none of which is in conflict. Thus, for example:

a. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996), a retaliation case, involved an employee's claim that she was terminated because she made a report of sexual harassment; a grant of summary judgment in favor of the employer was affirmed by the First Circuit on the ground that the employer's intent that she soon be fired was set forth in a company document predating her report.

b. *Jackson v. Delta Special School Dist. No. 2.*, 86 F.3d 1489 (8th Cir. 1996), a sexual discrimination and retaliation case, involved a school principal who, when a higher post she desired was given to one Ronald Smead, began a mostly-conceded year-long campaign of vilification against him, falsely describing him as a drug-dealing womanizer with drinking and financial problems; when discharged because of this and

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[3] We find it difficult to believe as—Metro-North surely believes (Petition 18)—that to describe a man as "too old and too slow and making mistakes" is to make "an ambiguous comment at best."

other misconduct, she brought an action claiming her firing was in retaliation for her earlier filing of a sexual discrimination claim; judgment n.o.v. in favor of the employer was affirmed by the Eighth Circuit on the ground that, in light of her conceded misconduct toward Smead, no rational jury could have found that the reason for her firing lay elsewhere.

c. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989), a retaliation case, involved a sales representative demoted (without loss of pay) because of the inappropriate way he treated subordinates and customers—with profanity, verbal abuse and even physical intimidation over a long period of time; Booker claimed that his demotion was in retaliation for a letter he sent to his employer's Human Resources Department in which "he attacked and attempted to blame all of his problems on his supervisors"; a grant of summary judgment in the employer's favor was affirmed by the Sixth Circuit on the ground that that letter was not the type of charge or complaint which could invoke the protection of the appropriate statute.

d. *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir 1979), *aff'd*, 452 U.S. 161 (1981), a sex discrimination and retaliation case, involved four out of six jail matrons whose positions were terminated after the four sued the County demanding pay equal to that of male guards and who claimed that their termination was in retaliation for their lawsuit; the District Court, after a non-jury trial, entered judgment for the employer; that judgment was affirmed by the Ninth Circuit on the ground that the Sheriff who terminated them had only a "vague awareness that matrons in general were demanding equal pay" and that the four matrons had presented no evidence that the Sheriff knew that they were the matrons who had sued the County.

e. *Nelson v. J.C. Penney Co.*, 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996), an age discrimination and retaliation case, involved, as did *Booker*, an employee with "an abrasive and intimidating management style" who, at age

55, was fired because of that style, while older managers remained on the job or were even promoted; a judgment in Nelson's favor was reversed by the Eighth Circuit on the ground that he had failed to produce any credible evidence to refute his employer's testimony that his firing was caused by his management style rather than his age or the fact that he had filed an age discrimination complaint, the court noting, *inter alia*, that there was "no evidence that Penney failed to discipline younger store managers with the same or similar difficulties."[4]

None of the cases which Metro-North described as similar to this one and in conflict with it is either similar or in conflict. The facts here show that Nelson learned that Padilla, previously deemed a star performer, had cooperated with the EEOC in an age discrimination case involving Barletta—a case in which Nelson knew that Padilla thought Metro-North to be in the wrong—and then demoted him for so-called "mismanagement" supposedly discovered after Padilla's cooperation with the EEOC. That a jury could rationally find that the "mismanagement" charge was a pretext is demonstrated by these words of the Second Circuit (A13):

> [A]lthough Badurina's budget analysis revealed that there were administrative problems at the OCC, when she previously had detected problems in the administrative practices of other units she first had met with managers of those units to attempt to resolve the problems. After discussing the problems at the OCC, however, Badurina did not allow Padilla an opportunity to provide a solution. Moreover, even though problems in the manpower control unit had cost Metro-North millions of dollars, no employees had been demoted in response. In contrast, even though the problems in the OCC had

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[4] The Eighth Circuit also noted, at 346, that Nelson had been given a "final warning about the status of his job before his supervisors knew of the age discrimination charge."

only cost Metro-North thousands of dollars, Padilla was demoted.

This case is not even remotely similar to those which Metro-North has cited for "conflict" purposes. The evidence of retaliation was clearly sufficient.

II. THE SECOND CIRCUIT NEITHER ANNOUNCED NOR APPLIED A *PER SE* STANDARD OF "WILLFULNESS"

Metro-North claims (Petition 20-22) that the Second Circuit announced and applied a *per se* standard of "willfulness" in affirming the jury's verdict on that issue.

Again, a mere reading of the Second Circuit's opinion on the "willfulness" issue (A 13-15) demonstrates that it *announced* no such standard.

The claim that the Second Circuit *applied* such a standard is likewise without merit. The Second Circuit simply held that by virtue of the facts of record, "the jury was entitled to find that Nelson's retaliatory conduct was willful" (A 14). The holding was based upon Nelson's own testimony that he knew that giving a statement to the EEOC is a "protected activity" under the law and that it is unlawful to retaliate against someone for engaging in a "protected activity." Aside from the ever-unlikely corporate confession of complete culpability—"We willfully violated the law"—it is difficult to imagine a more persuasive showing of willfulness than was made in this case.[5] The petition is therefore an invitation to rewrite the statute and eliminate the concept of willfulness—an invitation which this Court should decline.

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[5] Even if the claim had merit (which it does not) and the Second Circuit did, in fact, apply a *per se* standard in this case, Metro-North has conceded that that court generally follows the correct rule (Petition 21 n.5) and that the error occurred "only in this very case" (Petition 22). The correction of an isolated error, unlikely to recur, is not a traditional function of the writ.

The foundation of Metro-North's argument is that Nelson had already suspended Padilla for "mismanagement" by the time he learned about the latter's affidavit to the EEOC and that by demoting Padilla some weeks later Nelson had merely "followed through with a decision already in the making . . . . (Petition 22). Metro-North places great reliance upon "Nelson's persistent, and uncontroverted, denials . . . that he did not even know about Padilla's EEOC affidavit" until after May 9, i.e., after he had suspended him (Petition 21).

The foundation of Metro-North's argument has been built on quicksand. As the Second Circuit noted (A5): "Padilla testified that [on April 6, 1988—a month before his suspension] he told Nelson that he was scheduled for an EEOC interview concerning the charge by Barletta . . . ." Thus, as the Second Circuit held (A13), since Padilla had told Nelson the prior October that Barletta had been disqualified because of his age, "the jury could have found that Nelson knew of the content of Padilla's statement to the EEOC prior to suspending him." On this point, Metro-North asks this Court to grant certiorari upon factual allegations of a lack of evidence which are clearly refuted by both the record and the Second Circuit's accurate reading of that record.

III. THE SECOND CIRCUIT NEITHER RELIEVED PADILLA OF HIS DUTY TO MITIGATE DAMAGES NOR ERRED IN APPROVING A LIFETIME AWARD OF FRONT PAY

In order to clarify just how meritless Metro-North's position on the "mitigation" issue is, we set forth here some of the background facts.

When Padilla was illegally demoted, Metro-North "advised him to exercise his rights under the union contract covering dispatchers" (Petition 5). Padilla followed that advice and stayed at Metro-North in a lower-paying position. The District Court found no evidence that Padilla "would be able to find work commensurate with his skills at a salary equal to what

he received" at the position from which he was demoted (A34 n.4) and noted that any prospective employer would have been told by Metro-North that Padilla was an "incompetent" manager, since "mismanagement" was the ostensible reason for his demotion.[6] When he brought this action against Metro-North, Padilla did not seek an award of front pay; he sought reinstatement, the remedy which this Court has said is the preferable one. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 582 n.15 (1984). But, as the District Court noted, "leaving Metro-North would, no doubt, have reduced his chances of obtaining reinstatement as part of a final judgment."[7]

Against this factual backdrop, it can be seen that Metro-North's "mitigation" argument is actually this: Padilla was required to reject Nelson's "advice" that he accept a lower-paying position with Metro-North and had to seek employment elsewhere, despite the fact that he was unlikely to find a comparable position at comparable pay since, after all, he was a mere "mid-level manager with a high school education" whom Metro-North would describe as "incompetent" to any prospective employer. Moreover, Padilla would have to seek employment elsewhere even though leaving Metro-North would have reduced his chances of reinstatement once his rights were vindicated in a courtroom. Such a position does not merit the time of this Court.

Metro-North's claim (Petition 22-23) that the Second Circuit's decision is somehow in conflict with that of the Third Circuit in *Tubari v. NLRB*, 959 F.2d 451 (3d Cir. 1992), is not only erroneous but irrelevant. The claim is erroneous because

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[6] The statement is contained in a District Court opinion in this matter, not contained in the Appendix to the petition, but reported at 1995 WL 431324 at *1 (S.D.N.Y.). In its brief in the Second Circuit, at page 40, Metro-North saw fit to describe Padilla as a mere "mid level manager with a high school education"—hardly the description of a job seeker likely to set the managerial world on fire.

[7] See *id.* at *2 n.2.

the two cases involve significantly different facts: in *Tubari*, the employees were *terminated* but, instead of seeking comparable employment, almost immediately took low paying jobs with their own union picketing Tubari[8]. Here, Padilla accepted Metro-North's "advice" and remained employed by it. The claim is irrelevant because, as found by both courts below—consistent with other case law[9]—Padilla mitigated damages by remaining on the job at a position with lesser pay.

Finally, Metro-North asserts that there is an issue that this Court should resolve concerning the length of the front pay award—about twenty-three years. We note first that the issue is of Metro-North's own creation, since it refused to grant Padilla the reinstatement which was his (and the law's) preferred remedy. A show of adamancy on such an issue ought not merit this Court's review. Second, its argument that the purpose of front pay is to tide an employee over until comparable employment is found is valid enough in most cases, but the attempt to apply it here flies in the face of the fact that the District Court found that Padilla was unlikely to find such employment. The length of the front pay award is explained and justified by the undeniable fact that Metro-North chose to retaliate unlawfully against a relatively young man who cooperated with the EEOC, rather than one who did so on the verge of retirement. A defendant takes its plaintiff as it finds him.

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[8] In contrast to Padilla, whose employment skills were found to be unique, the workers in *Tubari* were unskilled, a fact upon which the Third Circuit relied when it stated, at 459, that "the very fact that the discriminatees were unskilled may have made it easier for them to find substantially equivalent employment."

[9] See, e.g.: *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273 (10th Cir. 1980), *cert. denied sub nom. Safeway Stores, Inc. v. Crespin*, 451 U.S. 986 (1981) ("[R]easonable diligence would not require claimant to have sought employment elsewhere. He remained in the employment of the defendant, secure in a long term position. Such conduct was prudent under the circumstances."); *Jurgens v. EEOC*, 903 F.2d 386, 389 (5th Cir. 1990) ("employee's duty to mitigate damages encompasses remaining on the job.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Date: May 16, 1997

Respectfully submitted,

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that sufficient evidence supported the jury's finding that petitioner violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, by retaliating against respondent for participating in an investigation by the Equal Employment Opportunity Commission.

2. Whether the court of appeals correctly concluded that sufficient evidence supported the jury's finding that petitioner's violation of the ADEA was willful.

3. Whether, in the circumstances of this case, the court of appeals correctly upheld an award of front pay until respondent reaches retirement age.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 92 F.3d 117. The opinions of the district court (Pet. App. 27a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1996. The petition for rehearing was denied on December 13, 1996. Pet. App. 45a-46a. The petition for a writ of certiorari was filed on March 13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1983, respondent Stephen Padilla began working for petitioner Metro-North Commuter Railroad Company. In April 1985, petitioner promoted respondent to the position of superintendent of train operations, responsible for petitioner's operations control center (OCC). Respondent reported to Edmond Boni, the general superintendent of transportation, who in turn reported to Donald Nelson, petitioner's vice president of operations. Pet. App. 3a.

One of respondent's principal responsibilities was ensuring the timely operation of petitioner's trains. Respondent's August 1987 performance evaluation, which Boni prepared, and Nelson approved, stated that the "[o]n-time performance" of petitioner's trains was "above goal in all categories." Pet. App. 4a. The evaluation described respondent as an "[e]xcellent leader and a natural organizer" who is "[v]ery cost conscious" and has "done an outstanding job of managing dispatchers and towers while reducing costs." *Ibid.*

In July 1987, respondent demoted Michael Barletta, a 61-year-old assistant chief train dispatcher. Although respondent believed that Barletta's performance was "excellent," Boni had stated to respondent that Barletta was "too old for the job" and instructed respondent to demote Barletta. In October 1987, respondent accompanied Nelson on a business trip to London. During the trip, Nelson asked respondent "what was going on with this Boni-Barletta business." Pet. App. 4a. Respondent answered by criticizing Boni's role in the demotion, stating that Boni had disparaged Barletta as "too old and too slow," and that Boni had "wrongly disqualified Barletta." *Ibid.*

In January 1988, Barletta filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination. As part of EEOC's investigation of Barletta's charge, respondent was scheduled to meet with EEOC investigators on April 6, 1988. On that date, respondent advised Nelson that he was scheduled to meet with the EEOC concerning Barletta's complaint. Because a serious train accident occurred on that same day, however, Nelson instructed respondent to reschedule the interview. Pet. App. 4a-5a.

On April 7, 1988, respondent met with an EEOC investigator. An attorney employed by petitioner also attended the interview. At the conclusion of the meeting, respondent signed an affidavit stating that Barletta had "performed his job satisfact[orily]," but that "Boni had insisted that Barletta be removed from his job." Pet. App. 5a. Respondent's affidavit stated further that Boni had made several disparaging remarks concerning Barletta's age. *Ibid.*

Shortly after respondent's April 7, 1988 interview with the EEOC investigator, Boni angrily approached respondent and accused him of being "disloyal," and said he was "all done." Pet. App. 5a. Later that month, Boni again threatened respondent that he was "all done," and that Boni was "going to get [respondent] for cooperating and being disloyal." *Ibid.* Boni also stated that "if you don't stop cooperating with them guys downtown, I'll take care of you. . . . I don't even have to do it myself, [I'll] get [Marijanke] Badurina [or another employee] to do it." *Id.* at 5a-6a.

Badurina was a financial analyst whom Boni had hired in February 1987 to review the budget of petitioner's transportation department, which at that time had four units: OCC, manpower control, tower

operations, and field operations. Pet. App. 6a. When Badurina encountered problems during her administrative review, she approached employees in the affected unit to attempt to resolve the problems. *Id.* at 6a, 13a. That was not the practice, however, with respect to respondent's unit. *Id.* at 13a.

During Badurina's review of OCC's payroll records in April 1988, Badurina discovered that one of respondent's deputies had approved and signed time sheets that indicated that some OCC employees had improperly used sick days to extend their two-day rest periods. Without first discussing the problem with anyone at OCC, Badurina alerted Boni about the problem. On May 3, 1988, Boni and Badurina discussed the problem with Nelson. Pet. App. 6a. On May 4, 1988, Nelson met with respondent to discuss the problems detected by Badurina. Because respondent had never been advised of the problem before this meeting and had not routinely reviewed time sheets as part of his job, respondent was unable to answer many of Nelson's questions. *Id.* at 6a-7a. At the end of the meeting, Nelson suspended respondent pending the outcome of an investigation of OCC's administrative practices by David Dieck, who was petitioner's director of budget and performance analysis. *Id.* at 7a.

On May 9, 1988, respondent filed a charge with the EEOC alleging that petitioner suspended him in retaliation for his participation in the EEOC's investigation of Barletta's charge. On May 10, 1988, Nelson was advised of respondent's charge. On May 13, 1988, Nelson received a summary of Dieck's findings that concluded that OCC employees had improperly coupled sick days with rest days. On June 10, 1988, Nelson demoted respondent. Respondent exercised his union bumping rights and returned to

his former position as a train dispatcher. Pet. App. 7a. As a result, his salary declined from $65,800 to about $45,000. *Id.* at 8a.

2. On December 7, 1988, respondent filed a complaint in district court alleging that petitioner violated Section 4(d) of the ADEA, 29 U.S.C. 623(d), by demoting him in retaliation for his participation in Barletta's EEOC proceeding.[1] The EEOC subsequently filed a complaint also alleging that petitioner violated the ADEA by demoting respondent. In March 1990, the court consolidated the actions for trial. Pet. App. 8a.

At trial, Nelson testified he demoted respondent not because of respondent's participation in Barletta's EEOC proceedings, but because of "mismanagement" at the OCC and because respondent had become "withdrawn" and had "show[n] less interest in the job." Pet. App. 7a. On June 30, 1994, the jury returned a verdict finding that petitioner willfully retaliated against respondent because of his participation in the EEOC's investigation of Barletta's charge. *Id.* at 8a.

On January 3, 1995, the district court entered an order denying petitioner's motion for judgment as a matter of law and denying respondent's request for reinstatement but awarding front pay. Pet. App. 27a-35a. The court concluded that "the jury could have found, on the evidence, that Nelson was aware of [respondent's] protected activity," including respondent's statement to the EEOC concerning Barletta and respondent's own retaliation charge. *Id.* at 28a.

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[1] Section 623(d) of Title 29 prohibits an employer from discriminating against an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

The court also concluded that "the jury could have found, on all of the evidence, that there was a causal connection between [respondent's] protected activity and his demotion." *Id.* at 29a (footnote omitted). The court reviewed the evidence and explained that it supported the conclusion that, on May 10 or 11, 1988, Nelson decided to demote respondent shortly after learning of his retaliation charge and before Nelson received Dieck's report of OCC's administration. *Ibid.* That same evidence, the court continued, supported the jury's disbelief of petitioner's articulated reasons for demoting respondent. *Id.* at 30a-31a. The court also determined that the evidence was sufficient to support the jury's finding that petitioner's violation of the ADEA was willful, because Nelson testified at trial that he was "aware that it's a violation of law to take action against an employee who engages in activity protected by that law" and that he knew "giving a statement to the [EEOC] is a protected activity under the law." *Id.* at 31a.

Turning to the question of relief, the court denied respondent's request for reinstatement because it believed that "reinstatement would, in the present case, be unworkable." Pet. App. 33a. The court also observed that "[t]here is no convincing evidence that [respondent], now in his forties * * * would be able to find work commensurate with his skills at a salary equal to what he received as Superintendent of Train Operations." *Id.* at 34a n.4. Accordingly, the court ordered petitioner to pay respondent "a salary equal to that paid to him as Superintendent of Train Operations * * * until such time during his sixty-seventh year * * * as he is entitled to receive a full pension." *Id.* at 34a. On September 12, 1995, the district court entered an amended judgment awarding

back pay of $108,720 plus interest, front pay equal to the difference between respondent's salary as a train dispatcher and his previous salary, and liquidated damages in the amount of $108,720 plus interest. *Id.* at 21a-23a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court rejected petitioner's contention that there was insufficient evidence to support the jury's finding that respondent was demoted in retaliation for his participation in EEOC proceedings. *Id.* at 12a. The court summarized the evidence demonstrating that respondent's suspension and demotion occurred within a month of Nelson's learning about respondent's protected activities. *Ibid.* The court also found that there was ample evidence entitling the jury to disbelieve Nelson's articulated reasons for demoting respondent. The court explained that petitioner "failed to show that [respondent] had become withdrawn and that he had demonstrated a lack of interest in his work." *Id.* at 12a-13a. Moreover, although petitioner attributed the demotion to the management problems Badurina had uncovered, there was evidence that respondent was treated more harshly than managers who were guilty of more serious mismanagement. For instance, payroll problems in respondent's unit cost petitioner some tens of thousands of dollars, whereas payroll problems detected in the manpower control unit, where no managers were demoted, cost petitioner millions of dollars. *Id.* at 6a, 13a. The court also noted that Nelson "acknowledged that he knew of [respondent's] retaliation charge prior to demoting him," and based on respondent's "testimony of his conversations with Nelson in October of 1987 and on April 6, 1988, the jury could have found that Nelson knew of the content of [re-

spondent's] statement to the EEOC prior to suspending him." *Id.* at 13a. Accordingly, the court concluded that "there was sufficient evidence to support the jury's conclusion that [respondent's] demotion was for purposes of retaliation." *Ibid.*

The court of appeals also found sufficient evidence supporting the jury's finding of willfulness. Pet. App. 14a. The court observed that Section 626(b) provides for the recovery of liquidated damages for "willful" violations of the ADEA, which occur when "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 13a-14a. The court concluded that "because Nelson knew that it was illegal for him to demote [respondent] in retaliation for [his] participation in EEOC proceedings, the jury was entitled to find that Nelson's retaliatory conduct was willful." *Id.* at 14. The court also rejected petitioner's argument that it established good faith under *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), because Nelson, on advice of counsel, waited to demote respondent until after the EEOC had conducted its investigation of his charge. The court reasoned that, unlike in *Thurston*, where "company officials had sought legal advice and had consulted with union officials before implementing a new employee transfer plan," Nelson "did not testify that * * * lawyers told him that [respondent] legally could be demoted, nor did he indicate that he in good faith relied on any such advice in taking action against [respondent]." Pet. App. 14a-15a.

The court of appeals also upheld the district court's award of front pay. Pet. App. 15a-20a. The court rejected petitioner's contention that respondent "failed to undertake reasonable efforts to mitigate his

damages." *Id.* at 17a. The court reasoned that respondent testified that his former position as superintendent of train operations is "so specialized as to be virtually unique" and "[t]here are no comparable positions in other industries." *Ibid.* In contrast, petitioner "failed to provide any evidence that suitable work existed for [respondent], who had only a high-school education and had worked solely for the railroads since the age of 22." *Id.* at 18a. Thus, the court concluded that "[i]n view of the absence of evidence that suitable work existed for him and in view of his unique and narrow work qualifications, [respondent's] failure to attempt to find a position comparable to that of superintendent of train operations did not constitute a failure to mitigate his damages." *Ibid.* Moreover, the court found that "given the lack of evidence of other opportunities available to [respondent], his decision to assume the position of train dispatcher * * * after his demotion was reasonable mitigation." *Ibid.*

The court also rejected petitioner's challenge to the duration of the district court's front pay award. Pet. App. 18a. The court reasoned that because respondent had "no reasonable prospect of obtaining comparable alternative employment," the award of front pay reflecting the difference between respondent's pre- and post-demotion salary was "necessary to make [respondent] whole after his demotion." *Id.* at 19a-20a. The court explained that respondent's limited education and work experience, which "has been confined primarily to serving as a dispatcher and a supervisor to dispatchers in the railroad industry," made it "very unlikely that he will be able to find alternative employment" at the salary he received as superintendent of train operations. *Ibid.* Thus,

the court concluded that although "the award of front pay in this case is for a lengthy period of time," "[i]n view of the unique circumstances of this case," the award constituted a "proper[ ] exercise[ ]" of the district court's discretion. *Id.* at 20a.[2]

ARGUMENT

The decision of the court of appeals correctly applies established legal principles to the unusual facts of this case and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 13-17) that the court of appeals' decision establishes "a new *per se* negligence standard" of liability under the ADEA inconsistent with this Court's decisions in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), and *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).[3] Based on its review of the facts in this case, however, the court of appeals simply held that respondent met its burden of proving that his demotion was a result of retaliation. That factbound holding does not warrant this court's review.

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[2] The court also rejected petitioner's contention that the front pay award was inconsistent with *McKennon* v. *Nashville Banner Publishing Company*, 513 U.S. 352 (1995), because even if petitioner had not demoted respondent in June 1988 for retaliatory reasons, it would have demoted him for a legitimate reason after the trial. Pet. App. 15a-17a. Petitioner does not raise that issue before this Court.

[3] This Court has assumed without deciding that the burden-shifting rules in Title VII cases apply to cases under the ADEA. *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996).

In any event, the court of appeals' decision is correct. This Court in *Hicks* reiterated the principle that a plaintiff alleging discrimination "at all times bears the ultimate burden of persuasion." 509 U.S. at 511. The decision below properly applied that standard and concluded that the evidence was sufficient to support the jury's verdict that petitioner violated the ADEA. In July 1987, Boni directed respondent to demote Barletta. In August 1987, respondent received favorable performance evaluations. In October 1987, respondent advised Nelson that Boni mistreated Barletta because of his age. On April 6, 1988, respondent advised Nelson that he would be giving a statement to the EEOC concerning Barletta's complaint. On May 4, 1988, Nelson suspended respondent.[4] On May 10, 1988, Nelson learned that

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[4] Petitioner argues that the court "relied only on [respondent's] vague and self-serving comments" to support the conclusion that the evidence supported the finding that, at the time of respondent's suspension, Nelson had knowledge of respondent's EEOC affidavit and its content, "despite Nelson's repeated denials" of such knowledge. Pet. 18, 19. This Court, however, "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the record contains ample evidence to support the court of appeals' conclusion that "the jury could have found that Nelson knew of the content of [respondent's] statement to the EEOC prior to suspending him." Pet. App. 13a. Respondent testified that Nelson asked him in October 1987 about the problem between Boni and Barletta, and that respondent informed Nelson that Boni had criticized Barletta because of his age and had "wrongly disqualifed" Barletta. *Id.* at 4a, 12a. Respondent also testified that he advised Nelson in April 1988 that he was meeting with an EEOC investigator about Barletta's case. *Id.* at 21a. That evidence is no more "self-serving" than Nelson's "repeated denials" that such conversations occurred.

respondent filed his own EEOC charge. On June 10, 1988, Nelson demoted respondent. Based on its review of those facts (Pet. App. 12a), the court correctly concluded "that a reasonable jury" could find in respondent's favor. Similarly, the court of appeals concluded that there was ample evidence to support the jury's disbelief that respondent was demoted for reasons other than retaliation. *Id.* at 12a-13a. The court's decision was thus entirely consistent with this Court's decision in *Hicks*. See *Hicks*, 509 U.S. at 511 ("rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").[5]

2. Petitioner also contests (Pet. 20) the jury's finding of willfulness because "[t]here was no * * * proof" that "Nelson knew or had reckless disregard for the fact that his demotion of [respondent] would violate ADEA," as required by the Court's decision in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 615 (1993). That factbound contention does not warrant further review by this Court. Moreover, the court of appeals correctly concluded that, based on Nelson's testimony, "because Nelson knew that it was illegal for him to demote [respondent] in retaliation for [his] participation in EEOC proceedings, the jury was

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[5] Petitioner argues (Pet. 13) that the court of appeals transformed this case into a "mixed-motives" case under *Price Waterhouse*, *supra*, by stating that a plaintiff must prove that retaliatory intent was at least one of the motivating factors behind the employment decision. See Pet. App. 12a. The court of appeals' statement, however, is equally true whether the case is governed by *Price Waterhouse* or by *Hicks*. Here, the court of appeals concluded that respondent satisfied his burden of proving discrimination and that holding did not shift to petitioner any burden of proof.

entitled to find that Nelson's retaliatory conduct was willful." Pet. App. 14a.

Petitioner further suggests (Pet. 21) that the fact "[t]hat Nelson waited, upon advice of counsel, to demote [respondent] until the EEOC completed its investigation of his charge should be sufficient to establish his good faith reliance upon counsel's advice" under the Court's decision in *Thurston*, *supra*. As the court of appeals correctly explained, however, "the mere fact that Nelson may have consulted with [petitioner's] legal department does not demonstrate that he acted in good faith in demoting [respondent]." Pet. App. 15a. In contrast to the Court's decision in *Thurston*, 469 U.S. at 129, in which the Court reversed an award of liquidated damages because the employer had "acted reasonably and in good faith" in relying on the opinion of counsel that the challenged plan was lawful, petitioner here presented no evidence that Nelson was advised by counsel that respondent "legally could be demoted," or that Nelson "in good faith relied on any such advice in taking action against [respondent]." Pet. App. 15a. Thus, the court of appeals properly upheld the award of liquidated damages based on the jury's finding of willfulness.

3. Petitioner also argues (Pet. 22) that the court of appeals' decision "reliev[ed] [respondent] of his obligation to mitigate his damages." That factbound contention does not warrant this Court's review. In any event, petitioner's arguments are without merit.

a. The decision below recognized that a victim of employment discrimination has a duty to "use *reasonable diligence* in finding other *suitable* employment." Pet. App. 17a. Based on the evidence in this case, the court of appeals correctly concluded that the district

court did not abuse its discretion in concluding that respondent engaged in reasonable mitigation efforts despite his failure to affirmatively seek a position comparable to the one from which he was demoted. The court of appeals relied on the facts that petitioner proffered no evidence that other suitable work existed; that respondent testified to "his unique and narrow work qualifications" and the lack of "comparable positions in other industries"; and that respondent acted reasonably in assuming the position of train dispatcher. *Id.* at 17a, 18a. Under those circumstances, the court of appeals properly concluded that respondent "acted reasonably in mitigating his damages." *Id.* at 18a.[6]

b. Petitioner also challenges the duration of the award of front pay "to a relatively young plaintiff who failed to mitigate his damages." Pet. 23. As noted

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[6] Contrary to petitioner's contention (Pet. 22-23) the decision below does not conflict with the Third Circuit's decision in *Tubari, Inc.* v. *NLRB*, 959 F.2d 451 (1992). *Tubari* involved the appropriateness of back pay following an employer's violation of the National Labor Relations Act, 29 U.S.C. 158(a)(1)-(3). The Third Circuit held that the employees did not reasonably mitigate their damages when they accepted 66% of their former salary as "wages" for picketing "without undertaking any search for alternative employment, either in the same line of work or elsewhere." 959 F.2d at 459. *Tubari* applied the same legal standard as employed by the decision below. *Id.* at 454 (employer must "demonstrate[] that an employee did not exercise reasonable diligence in his or her efforts to secure employment" to establish that the employee did not reasonably mitigate damages). Moreover, unlike the facts present in *Tubari*, the decision below found that respondent reasonably accepted employment as a train dispatcher in light of his unique skills and the unavailability of other comparable employment. Pet. App. 17a; see also *id.* at 34a n.4.

above, however, the court of appeals properly concluded that respondent reasonably mitigated his damages. Moreover, the court of appeals correctly concluded that because respondent had "no reasonable prospect of obtaining comparable alternative employment," the award of front pay was "necessary to make [respondent] whole after his demotion" based on "the unique circumstances of this case." Pet. App. 19a, 20a. No further review of that factual finding is warranted.

Petitioner also is incorrect in arguing (Pet. 22-23) that the decision below conflicts with the decisions of other courts that have awarded front pay of shorter duration. Those decisions involved facts significantly different from those here. See *Weaver* v. *Casa Gallardo, Inc.*, 922 F.2d 1515, 1529 (11th Cir. 1991) (reversing front pay award because district court failed to "state any reason why * * * [claimant] should not have been able to work his way up from management trainee to a supervisory position" during period of front pay); *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976) (noting that the "economic climate in the pharmaceutical advertising industry" suggested that plaintiff could secure comparable employment within a year).[7]

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[7] The Eighth Circuit in *United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 81 F.3d 798, 805 (1996), expressed "grave doubt" that an award of 24 years of front pay could be upheld on remand in a case involving a violation of the National Labor Relations Act, 29 U.S.C. 158(a)(5), because the employee's "relatively young age should improve his future opportunities to mitigate through other employment." That dictum does not conflict with the decision below, however, because respondent had "no reasonable prospect of obtaining comparable alternative employment." Pet. App. 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

In his brief in opposition, the Solicitor General argues that the Second Circuit's decision in this case is "too factbound" to be worthy of this Court's review. (*See, e.g.*, Solicitor General Br. at 10) If "too factbound" were the standard for the denial of a petition for writ of certiorari, this Court would not have decided a single discrimination case: discrimination cases, requiring, as they do, proof of a discriminatory adverse decision and some rational evidentiary basis for the evaluation of that proof, are, by definition, "factbound."

The questions of law raised in the petition of Metro-North Commuter Railroad ("Metro-North") are straightforward, and both respondents beg them. The Second Circuit's decision upholds liability and a concomitant willfulness finding where there is no evidence of the decisionmaker's retaliatory intent or even his knowledge of plaintiff's protected activity. The decision also approves a lifetime award of front pay to a relatively young plaintiff who failed to mitigate his damages. These holdings convert this case from one which is "factbound" to one which departs from this Court's precedents and conflicts with the decisions of other Courts of Appeals. It is therefore appropriate for this Court's review.

I. THE LIABILITY HOLDING IN THIS CASE WILL AFFECT THE RESOLUTION OF MANY OTHER DISCRIMINATION CASES

A. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE PLAINTIFF CONTENDS SOMEONE OTHER THAN THE DECISIONMAKER HARBORED A DISCRIMINATORY MOTIVE AND "CAUSED" THE ADVERSE DECISION

Both the Solicitor General and plaintiff-respondent Stephen M. Padilla ("Padilla" or "plaintiff") argue that the Second Circuit applied a pretext analysis under *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792 (1973), and its progeny, including *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), and not the "mixed motives" analysis set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Padilla claims that the Second Circuit did not apply *Price Waterhouse* because the Court did not cite that case. (Padilla Br. at 5) The Second Circuit, citing *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995), held that plaintiff is

> " 'not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors.' "

(A-12).[1] *Cronin*, in turn, cites *Price Waterhouse*, 490 U.S. at 247, 249 (plurality opinion), and describes it with the following parenthetical: "where employer has shown a legitimate motive, the plaintiff need not show that the prohibited factor was the sole or principal reason, or '*the* "true reason." ' " *Cronin*, 46 F.3d at 203 (parentheses omitted) (emphasis in original).

The Solicitor General argues, without a supporting citation, that the Second Circuit's "motivating factor" test "is equally true whether the case is governed by *Price Waterhouse* or *Hicks*." (Solicitor General Br. at 12 n.5) If this is an accurate statement of the law, then this Court's decision in *Hicks* is

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[1] The Second Circuit assumed that the "mixed-motives" analysis applies to retaliation cases (A-12), but in *Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir. 1997), the Third Circuit held that § 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), does not apply to retaliation cases under Title VII, 42 U.S.C. §§ 2000e, *et seq*. The Third Circuit's reasoning would apply equally to retaliation cases under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq*., as the substantive provisions of the two acts are the same. In *Woodson*, the court reversed the denial of defendant's motion for a new trial because, *inter alia*, the trial court had erroneously given a "motivating" factor instruction, rather than a "determinative" factor instruction. *Id.* at 935.

superfluous, and other Courts of Appeals have been wasting their time separating the two distinct analyses.

This Court made clear in *Price Waterhouse* that the "mixed motives" analysis applies only where plaintiff proves that a discriminatory motive was one of the reasons actually motivating the decisionmaker at the time of his decisionmaking. *Price Waterhouse*, 490 U.S. at 241 (Brennan, J., plurality opinion); *see also id.* at 277 (O'Connor, J., concurring).[2]

Arguing that the Second Circuit applied the pretext analysis, respondents impute, *sub silentio* and without citing any supporting evidence, Edmond Boni's alleged retaliatory animus in reporting plaintiff's mismanagement to Donald Nelson, who made the decision to demote plaintiff. (Padilla Br. at 7; Solicitor General Br. at 11-12) Their argument and the Second Circuit's decision share this flaw in reasoning. (A-12 to A-13)

Had the Second Circuit separated the motives of Boni and Nelson, as *Price Waterhouse* requires, and as other Court of Appeals have done in similar circumstances,[3] and applied the

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[2] If he does so, the defendant bears the burden to prove that he would have made the adverse decision anyway. *Price Waterhouse*, 490 U.S. at 244-45 (Brennan, J., plurality op.); *see also id.* at 275-78 (O'Connor, J., concurring). The Second Circuit, however, erroneously applied the "mixed motives" analysis to a "pretext" fact pattern and then compounded its error by depriving Metro-North of the benefit of its proof. Other Courts of Appeals have alternatively applied the "mixed motives" analysis to similar fact patterns and have held that defendant was entitled to judgment as a matter of law. (*See* Pet. at 16) Neither respondent attempts to distinguish those cases.

[3] Padilla attempts to distinguish the cases we cite (Pet. at 14-15) by trying to make it appear that in each case the person harboring the discriminatory motive was far more removed than Boni from the adverse decision. (Padilla Br. at 7-9) In each case, someone with a discriminatory motive arguably "played a role" in the adverse decision. In each case, the Court of Appeals held that defendant was entitled to judgment as a matter of law because plaintiff had not produced proof that the *decisionmaker* relied upon that discriminatory motive in making his decision.

"pretext" analysis to Nelson's decision, it could not have affirmed the district court's denial of Metro-North's motion for judgment as a matter of law. There is no evidence in the record, and none cited in the Second Circuit's opinion, of a causal relationship between Boni's motives and Nelson's decision, and there is no evidence that Nelson's reason was a pretext at all, let alone that it was a pretext for retaliation. *See Hicks*, 509 U.S. at 514-15.

In support of his pretext argument and having imputed Boni's motives to Nelson, Padilla makes much of the "fact" cited in the decision (A-13) that the "mismanagement" of another manager in Boni's department, who was not demoted, resulted in the loss of far more money to Metro-North than did Padilla's mismanagement. (Padilla Br. at 11-12; *see also* Solicitor General Br. at 7) This argument, however, erroneously assumes that Padilla and Paul Hirsh, the other manager, were similarly situated.

Nelson testified about the differences in Hirsh's and Padilla's respective departments. In Nelson's view, Hirsh, who was responsible for the assignment of 900 train and engine employees, needed additional computer support, while Padilla did not need a computer to track the movement of his small workforce. (Tr. at 306-07) Hirsh testified with respect to "coupling," the problem in Padilla's department that Boni and Marijanke Badurina brought to Nelson's attention on May 3 (Tr. at 566-69), that he was "dealing with" that problem by implementing "an absentee control program" he had initiated. (Tr. at 287) In contrast to Hirsh, Padilla did not recognize, much less establish procedures to solve, this problem.

Respondents also rely heavily on Padilla's good performance evaluations. (Solicitor General Br. at 2; Padilla Br. at 2, 11) Padilla's last formal evaluation was conducted in late 1987 (Ex. 7), before Badurina began her review of Padilla's books in February 1988 (Tr. at 183, 361, 481) and before Nelson received Padilla's letter of March 23, 1988, in which Padilla complained that Boni had unfairly accused him of

attempting a "coup" to get Boni's job and in which Padilla expressly told Nelson he would retaliate if anything did happen to him. (Ex. 8) Mismanagement previously unknown is a legitimate nondiscriminatory reason, and past good performance evaluations do not as a matter of law establish pretext. *Billet v. CIGNA Corp.*, 940 F.2d 812, 826 (3d Cir. 1991).[4] Inappropriate behavior is also a legitimate nondiscriminatory reason, and a third party's differing assessment of that behavior does not as a matter of law establish pretext. *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 799 (7th Cir. 1997).

Nelson expected Padilla to know what was going on in the department he was being "paid well" to manage. (Tr. at 370-75, 617) Respondents do not cite evidence of any error in the expanded review Nelson ordered upon suspending Padilla or any evidence casting the slightest doubt upon Nelson's good faith reliance upon that review or upon his own assessment of Padilla's and Boni's performance in his decisions to remove both Padilla and Boni from their positions. Respondents' view, like the Second Circuit's (A-12 to A-13), is simply that the jury was entitled to "disbelieve" Nelson's explanation. (Solicitor Gen. Br. at 12; Padilla Br. at 5, n.1) Plaintiff cannot, however, raise a jury question merely by contending that the jury might "disbelieve" the decisionmaker. *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410-412 (7th Cir. 1997) (collecting cases).

Much as they impute Boni's motives to Nelson, respondents also assume that "timing" is all that is needed to prove pretext. According to them, Nelson did not await the results of the expanded review he ordered upon suspending Padilla to decide to demote him. (Solicitor General Br. at 6, 11-12; Padilla Br. at 2-4) The undisputed fact is that Nelson did not demote Padilla until June 10, and plaintiffs offered no evidence to show that Nelson received any information between

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[4] *See also Fleckenstein v. ITT Consumer Fin. Corp.*, No. 4-91-CV-459, 1993 WL 285874, *5-7 (D. Minn. July 22, 1993); *McGill v. Sybron Corp.*, 702 F. Supp. 405, 408 (W.D.N.Y. 1989).

May 4 (when Nelson suspended him and before Padilla filed his retaliation charge) and June 10 suggesting that Nelson should change his mind. To the contrary, the reports he received on May 13 (Ex. 13) and thereafter (Ex. 14) only confirmed his initial conclusion on May 4 that he should remove Padilla from his position. (Ex. B) Other Courts of Appeals have held that suspicious timing is insufficient as a matter of law to carry the day for plaintiff once defendant articulates a legitimate nondiscriminatory reason for the adverse action. *E.g.*, *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346-47 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996) (collecting cases); *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996).

The Second Circuit's decision, in contrast, relieves plaintiff of any meaningful burden to prove causation.

B. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE THE DECISIONMAKER HAS NO ACTUAL KNOWLEDGE OF PLAINTIFF'S MEMBERSHIP IN A PROTECTED CLASS

As to Nelson's knowledge of Padilla's participation, Padilla cites only his testimony at trial that on April 6, 1988 he told Nelson that he *had an appointment scheduled* with the Equal Employment Opportunity Commission in its investigation of Michael Barletta's charge of age discrimination. (Padilla Br. at 3, 5) Plaintiffs never produced any proof that Nelson knew before he suspended Padilla on May 4, 1988 that Padilla (or anyone else) had actually met with the EEOC, made an affidavit, or participated in any way in that investigation.

As to Nelson's knowledge of the contents of Padilla's affidavit before he suspended him, respondents recite only the "evidence" relied upon by the Second Circuit—that some six months before plaintiff made his affidavit, and without regard to intervening events, he had told Nelson that Boni had wanted Barletta disqualified because he was "too old."

(Padilla Br. at 13)[5] So, according to this reasoning, because Nelson "knew" six months before Padilla even made his affidavit that Padilla "thought" Boni's decision to disqualify Barletta was wrong and because Nelson knew that Padilla had an appointment with the EEOC, Nelson's decision to suspend Padilla on May 4 was retaliatory.

The logic of the Second Circuit's decision would hold Nelson to have retaliated whether or not Padilla ever actually met with the EEOC or made an affidavit, because, in the Second Circuit's and respondents' view, it was enough that Nelson "knew," prospectively, that Padilla had damaging things to say, whether or not he ever actually said them and whether or not they were true. According to this reasoning, after Nelson had gained such knowledge, any adverse decision he then took against Padilla, regardless of the reason behind it, would have been retaliatory. Other Courts of Appeals have rejected such reasoning. (*See* Pet. at 17-19)[6]

The Second Circuit's decision, in contrast, allows plaintiffs to rely upon mere suggestions to prove their employers' constructive knowledge of their protected activity and then to use

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[5] Padilla's statement was that he told Nelson that "Boni was telling me [Padilla] that Barletta was too old *and too slow and making mistakes*." (Tr. at 65) (Emphasis added.) Barletta was a train dispatcher; regardless of his age, a dispatcher's being "too slow" and "making mistakes" can have deadly consequences, especially when he works for a commuter railroad. *See* 45 U.S.C. §§ 61, *et seq.* (train dispatchers one of five groups of "safety-sensitive" railroad employees subject to Hours of Service Act). One of the other items of mismanagement disclosed in the May 13 report was that Padilla failed to send his train dispatchers for mandatory physical examinations. (Ex. 13)

[6] Padilla attempts to distinguish some of the cases we cite, but, once again, begs our argument. (*See* Padilla Br. at 9-10) In each case, plaintiff contended that the "circumstantial evidence" was sufficient to charge the decisionmaker with knowledge of his protected classification, and in each case, the Court of Appeals rejected the argument as a matter of law. Those cases are directly on point and directly contrary.

that "constructive knowledge" as a shield from an adverse decision.

II. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE THE ONLY PROOF OF "WILLFULNESS" IS THE DECISIONMAKER'S KNOWLEDGE OF THE PLAINTIFF'S PROTECTED CLASSIFICATION

Padilla argues that Nelson's mere knowledge of Padilla's protected activity supports the "willfulness" holding. (Padilla Br. at 13) This reasoning is in direct conflict with *Nelson*, *supra*, where the plaintiff's new manager, who was advised by plaintiff's former manager of plaintiff's age (54), later informed plaintiff that he was aware of his age. The Eighth Circuit rejected as a matter of law the argument that the new manager's awareness of the plaintiff's age was even a basis for liability: "A fact finder may not simply convert a condition that is necessary for a finding of liability (here, knowledge of a plaintiff's age) into one that is sufficient for such a finding." 75 F.3d at 346. In contrast, the Second Circuit converted a "necessary condition," Nelson's knowledge of plaintiff's protected activity, into a "willful" violation.

The Second Circuit's "willfulness" holding is flawed because it is based upon its erroneous liability holding: According to the Second Circuit, once Nelson was charged with Boni's motive and once he was charged with constructive knowledge that plaintiff was, or might at some point be, in a protected class, Nelson "willfully" violated the law, *per se*, when he demoted plaintiff. The Second Circuit's decision equates mere knowledge of a protected activity with "willful" disregard of the law and is contrary to this Court's decisions in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615-17 (1993), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-28 (1985).

III. BECAUSE THE SECOND CIRCUIT RELIEVED THE PLAINTIFF OF ANY BURDEN TO MITIGATE HIS DAMAGES AND APPROVED A LIFETIME AWARD OF FRONT PAY, THIS CASE WILL AFFECT THE RESOLUTION OF MANY CASES

Respondents argue that Padilla was relieved of any burden to mitigate his damages by seeking comparable employment, because, as a skilled manager, he had no reasonable prospects of finding such work. (Solicitor General Br. at 14; Padilla Br. at 13-14) This argument is not supported by any proof that Padilla actually sought any comparable employment. Both respondents attempt to distinguish *Tubari Ltd. v. NLRB*, 959 F.2d 451, 459 (3d Cir. 1992), on the ground that the workers in that case were "unskilled" (Solicitor General Br. at 14 n.5; Padilla Br. at 15), thereby suggesting that skilled workers are automatically relieved of any burden to attempt reasonable mitigation efforts. We know of no such limitation on the duty to mitigate. The Second Circuit's decision is directly contrary to *Tubari*.

Had Metro-North fired Padilla outright, he would have had, unquestionably, a duty to mitigate. Padilla makes the nonsensical argument that Metro-North relieved him of this duty because Nelson demoted rather than fired him. (Padilla Br. at 13) By this reasoning, an employer who demotes rather than dismisses an employee is punished because its liability will never be reduced beyond what the lower position pays.

As to the Second Circuit's approval of the lifetime award of front pay, both respondents simply argue that that award is appropriate in lieu of reinstatement. (Solicitor General Br. at 15; Padilla Br. at 15) The Solicitor General contends that *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1528 (11th Cir. 1991), is distinguishable on its facts because there the district court did not state any reason why the plaintiff "should not have been able to work his way up . . . to a supervisory position." (Solicitor General Br. at 15) That is the exact situation

in this case; the Second Circuit did not cite any evidence to support its conclusion that the front pay award was appropriate in the "unique circumstances of this case." (A-18 to A-20) *Weaver* is directly on point and directly contrary.

Finally, Padilla, having admitted that his skills are in dispatching trains rather than in managing people (Sept. 15, 1994 Tr. at 17), contends that the award is justified as an additional punitive measure for Metro-North's unlawful retaliation in demoting a "young man." (Padilla Br. at 15) However, the purpose of front pay is to give plaintiff "a reasonable opportunity to find other employment," *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977), not to punish the employer for the remainder of the employee's working life.

CONCLUSION

The Court should grant certiorari in this case.

Respectfully submitted,

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